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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 223

FAIRVIEW PUBLIC UTILITY DISTRICT, NUMBER ONE, WILLIAM E. MOORE, FERN WILLIAMS, GLENN H. EAGON, AL OTTER, AND PAULINE TRUEX, *Appellants*,

v.

CITY OF ANCHORAGE, A MUNICIPAL CORPORATION, *Appellees*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

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v.

CITY OF ANCHORAGE, A MUNICIPAL CORPORATION, *Appellees*

LAWRENCE HAWK, ET AL, *Appellants*,

v.

FAIRVIEW PUBLIC UTILITY DISTRICT NUMBER ONE, ET AL, AND CITY OF ANCHORAGE, A MUNICIPAL CORPORATION, *Appellees*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

STATEMENT OF JURISDICTION

The Appellants, pursuant to the United States Supreme Court Rules 13 (2) and 15, file this their statement of the basis upon which it is contended that the Supreme Court of

the United States has jurisdiction on a direct appeal to review the final decree in the above entitled cases, and should exercise such jurisdiction in this ase.

Opinion Below

The Supreme Court of the State of Alaska delivered a written opinion of the decision of this case on February 2, 1962. Copies of this final decree herein are attached to this jurisdictional statement.

Jurisdiction

The appeal herein is from a final decree made and entered by the Supreme Court of the State of Alaska, concerning the validity of the annexation of the Fairview Public Utility District, Number One, to the City of Anchorage, a municipal corporation. ACLA Cum Sup 16-7-2, 1959 which Appellants claim to be unconstitutional, and Appellants sought to have same declared null and void for repugnancy to the Fourteenth and Fifteenth Amendments of the United States Constitution. Appellants also complained of the methods allowed by the said provisions, as well as the vagueness thereof. In view of the fact that annexation by the petition-election procedure was allowed residents of the Spenard Public Utility District area, almost simultaneously (SLA 1953, Ch. 183, Secs. 16-1-29, 2 9 n ACLA Cum Sup 1957), Appellants, acting in their capacity as Directors, as well as individual citizen and taxpayers of the illegally annexed area claimed a denial of the equal protection of the laws. The Court held that the petition-election method was still in full force and effect and permitted the residents of the Spenard Public Utility District area to vote as to whether

they should come into the City of Anchorage. However, the Court also held that the Boundary Commission method which permitted no vote on the part of the citizens of Fairview, was a valid and constitutional act, not violative of any rights of petitioners.

The final decree appealed from was made and entered on the second day of February, 1962. Notice of Appeal was filed in the United States Supreme Court on the second day of March, 1962, and an Extension of Time, giving Appellants until July 2, 1962 to file their Jurisdictional Statement, was signed on the 28th day of May, 1962 by Justice William O. Douglas, of the United States Supreme Court.

The Supreme Court of the United States has jurisdiction to review by direct appeal, the judgment and decree complained of by the provisions of 28 USC, Section 1257 (2).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Gomillion et al, Petitioners*, v. *Lightfoot*, 364 US 339, *Colegrove* v. *Green*, 328 US 549: *Western Union Telegraph Co.* v. *Foster*, 247 US 105: *Nixon* v. *Herndon*, 273 US 537: *Lane* v. *Wilson*, 307 US 268: *United States* v. *Reading Co.*, 226 US 32: *Graham* v. *Folson*, 200 US 248: *Frost and Frost Trucking Co.* v. *Railroad Commission of California*, 271 US 583: *MacDougall* v. *Green*, 335 US 281, *Yick Wo* v. *Hopkins*, 118 US 356: *Hague* v. *CIO*, 307 US 496: *Shapleigh* v. *San Angelo*, 167 US 646: *Mobile* v. *Watson*, 116 US 289: *Shelley* v. *Kraemer*, 334 US 1: *Guinn* v. *United States* 238 US 347: *Myers* v. *Anderson*, 238 US 368: *Lassiter* v. *Northampson Electric Board*, 360 US 47: *South* v. *Peters*, 339 US 276: *Smiley* v. *Holm*, 285 US 355: *Smith* v. *Allright*, 321 US 649: *Winters* v. *State of New York*, 333 US 507, *Miller* v. *Shoene*, 276 US 272.

Alaska Statutes and Constitutional provisions which are involved are:

1. *Alaska Constitution:*

Article II, Section 19.

The Legislature shall pass no local or special act, if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination. Local acts necessitating appropriations by a political subdivision may not become effective unless approved by a majority of the qualified voters voting thereon in the subdivision affected.

Article X, Section 3. (Local Government.)

The entire State shall be divided into boroughs, organized or unorganized. They shall be established in a manner and according to standards provided by law. The standards shall include, population, geography, economy, transportation and other factors. Each borough shall embrace an area and population with common interests to the maximum degree possible. The legislature shall classify boroughs and prescribe their powers and functions. Methods by which boroughs may be organized, incorporated, merged, consolidated reclassified, or dissolved shall be prescribed by law.

Article X, Section 9.

The qualified voters of any borough of the First Class may adopt, amend, or repeal a home rule charter in a manner provided by law. In the absence of such legislation, the governing body of a borough or city of the first class shall provide the procedure for the preparation and adoption or rejection of the charter. All

charters or parts or amendments of charters shall be submitted to the qualified voters of the borough or city, and shall become effective if approved by a majority or those who vote on the specific question.

Article X, Section 12.

A local boundary commission or Board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed changes to legislature during the first ten days of any regular session. The chance shall become effective forty-five days after presentation or at the end of the session, which ever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

Article XV, Section 3.

Cities, school districts, health districts, public utility districts, and other local subdivisions of government existing on the effective date of this constitution shall continue to exercise their powers and functions under existing law, pending enactment of legislation to carry out the provisions of this constitution. New local subdivisions of government shall be created only in accordance with this constitution.

2: *Alaska Statutes:*

ACLA Cum Sup., 1959, Section 16-7-2—Powers:

The Commission May Consider any Local Government Boundary or any Proposed Local Government Boundary Change and Exercise Such Other Powers

AS MAY BE PRESCRIBED BY LAW. IT SHALL PRESENT PROPOSED LOCAL GOVERNMENT BOUNDARY OR LOCAL GOVERNMENT BOUNDARY CHANGES TO THE LEGISLATURE DURING THE FIRST TEN DAYS OF ANY REGULAR SESSION. THE BOUNDARY CHANGE AS RECOMMENDED SHALL BECOME EFFECTIVE 45 DAYS AFTER PRESENTATION TO THE LEGISLATURE OR AT THE END OF THE LEGISLATIVE SESSION, WHICHEVER IS EARLIER, UNLESS DISAPPROVED BY A RESOLUTION CONCURRED IN BY A MAJORITY OF THE MEMBERS OF EACH HOUSE OF THE LEGISLATURE. CITIES SHALL HAVE SUCH POWERS REGARDING BOUNDARIES AS CONFERRED ON THEM BY GENERAL LAW. THE COMMISSION MAY RECOMMEND TO THE LEGISLATURE THE PROCEDURES WHEREBY A LOCAL BOUNDARY MAY BE ADJUSTED BY LOCAL ACTION. (L. 1959 Ch. 185, Sec. 2, Page 288, effective May 6, 1959.)

Chapter 45, Session Laws of Alaska, 1960, Repealing Chapter 185, Session Laws of Alaska, 1959: *Relating to Duties and Power of the Local Boundary Commission and Procedures for the Exercise of those Duties and Providing for an Effective Date . . .*

Section 2. (4)

No local government boundary change may be proposed to the legislature unless a hearing on the change has been held in or in the near vicinity of the area affected by the change.

Section 3.

Meetings and Hearings may be called by the Chairman of the Commission or by the Division of Local Affairs with the concurrence of the Chairman.

(1) All meetings and hearings of the Commission shall be public.

(2) Minutes shall be kept of all meetings and hearings unless the entire proceedings are transcribed in which case minutes shall be made from the transcription. All minutes are a matter of public record.

(3) All votes taken by the Commission shall be entered in the Minutes.

(4) Public notice of any hearing shall be made in the area in which the hearing is to be held at least 15 days before the date of the hearing and the notice shall include the time, date, place, and subject of the hearing. The Director of Local Affairs shall give notice of the hearing at least three times in the press, through other news media, or by posting in a public place whichever is most feasible.

(5) Three members of the Commission constitute a quorum on the conduct of business at a meeting and two members constitute a quorum of a conduct of business at a hearing, provided that a majority of the membership of the commission must vote in favor of the Boundary change before it may be presented to the Legislature. *Effective date is March 28, 1960.* (Italics supplied.)

'ACLA, 1959, Section 16-1-5: DISSOLUTION: Petition for Election Order and Notice: Canvass and Certificate of Results: Order of Dissolution.

Whenever the population of any City in the Territory of Alaska shall fall below 500 in number, the Council

of such City or if such Council shall have ceased to function, 25 persons owning real property in such City may file with the District Court in the Division where such City is situated, a petition praying for an Order to dissolve and vacate the incorporation of such City and setting forth in such petition any good and substantial reasons why such corporation should be so dissolved and vacated. Upon the filing of such petition, the Court shall order an election upon the question as to whether or not the Corporation should be so dissolved, and the Court shall in said Order fix the date of such election, prescribe the notice to be given, and appoint a Judge and two clerks for such election: the order of the Court shall also prescribe the form of ballot to be used at such election. Notice of such election shall be given by publication for a period of four weeks prior to such election if there be a newspaper published in the City, and if not, the notice may be given by posting for said period of such notice in at least three public places in said City. The returns of said election shall be made to the Clerk of the Court, who shall file a certificate of results thereof in the action of dissolution of said corporation, and if from said certificate it appears that three fifths of the persons voting at said election have voted in favor of the dissolution and vacation of said corporation, the Court shall enter an order, dissolving and vacating said corporation: provided, however, that no City shall be entitled to disincorporate until all the indebtedness owing by said City shall have been fully paid, and this fact must be proved to the satisfaction of the Court before the entry of the aforesaid Order. (L 1923, Ch 97, P 213, Sec. 46, CLA 1933, Sec. 2414.)

ACLA Cum Sup. 1957, Section 49-2-13:

First: Any duly incorporated public utility district may be dissolved in like manner as provided for in the dissolution of municipal corporations as set forth in Section 16-1-5: provided however, that for the purposes of this Act, "United States Commissioner as ex officio Justice of the Peace, of the Territory of Alaska in the Recording Precinct", shall be substituted for "district court in the Division", and U.S. Commissioner as Justice of the Peace shall be substituted for "clerk and Clerk of the Court" in said section. A petition for dissolution may be filed, whenever, (a) the population of a district falls below 200, (b) the whole of the integral part of a District becomes annexed to an incorporated city, (c) the government of such district has failed to service any of its functions for more than two successive years, (d) other good and sufficient reasons for dissolution appear and are stated in the petition. No order of dissolution shall be made until all indebtedness owing by the District shall have been paid, or secured to the Bonholders and Creditors of such District in a manner found satisfactory by the Court.

Second: Any money belonging or owing to a Public Utility District and any and all properties owned by such district dissolved as herein provided shall become the property of the Territory of Alaska, in the same manner as property of a dissolved City: except that where a Public Utility District is dissolved because of annexation of the whole or the integral part of such district to an incorporated city, such money or property shall be used, first to pay any outstanding indebtedness to the District, second, any money or property

left thereafter shall become the property of the City but insofar as practicable shall be used for the purpose of making public improvements in the area so annexed, provided that, in cases where a part of the District is annexed containing District assets, the U.S. Commissioner, as ex officio Justice of the peace for the Territory of Alaska in the recording precinct in which the City is situated shall fairly apportion the assets or proceeds thereof between the part annexed and the remaining portion of the District.

Third: Any portion of a District may be exeluded in like manner as provided for in the exclusion of territory from incorporated cities in Section 16-1-2., ACLA 1949, or in the alternative, the Board of Directors of any such District may provide by ordinance or resolution for the exclusion of any portion upon such reasonable terms and conditions as such ordinance or resolution may prescribe, except that such exclusion ordinance shall not become effective until approved by a majority of the qualified electors in the area to be excluded, as well as by a majority of the qualified electors in the remaining portion of such public utility district at a special election held in like manner as is provided for franchise elections, in 49-2-21, ACLA 1949, as amended, provided that when any portion of a public utility district is thus dissolved, all property located in the excluded area shall remain liable for and subject to the lien of any outstanding bonded indebtedness, accrued assessments or taxes of such district, and all property in such excluded area owned by such district shall be and remain the property of the district: provided, that the excluded territory shall not be liable for any taxes levied after the date of exclusion, except for payment of any liability for the

principal, interest and charges on bonded indebtedness subject to lien as aforesaid.

Fourth: When any territory of a public utility is annexed to a city, that territory is automatically excluded from the public utility district from and after the date that the annexation order or ordinance shall take effect: provided, that no order of annexation shall be made until all indebtedness, owing by the District, shall have been paid or secured to the bondholders and creditors of such District, in a manner found satisfactory by the Commissioner.

Cum. Sup. 16-1-29 (1957), Chapter 183, Session Laws of Alaska. *Relating to Annexation and Exclusion of Areas by Municipalities:* and Repealing Section 16-1-21 ACLA 1949, Section 16-1-22, ACLA 1949, as Amended by Ch. 7, SLA 1951 and Ch. 22, SLA 1953: Sec. 16-1-23, ACLA 1949: Sec. 16-1-24, ACLA 1949, as amended by Ch. 7, Session Laws of Alaska, 1951, Ch. 23, SLA, 1953, and Ch. 14, SLA 1955: Secs. 16-1-25 through 16-1-27, ACLA 1955: and Sec. 16-1-28 ACLA 1949, as amended by Ch. 25, SLA 1953.

Annexation Act of 1957, appearing in Alaska Compiled Laws Annotated, Cumulative Supplement, 1958.

Section 16-1-29 b *Petition for Annexation:*

Upon the initiation of interested persons residing within an area contiguous to the municipality, a petition may be circulated within the area proposed to be annexed requesting that such annexation be made . . . (1) Whenever the petition has been signed by 30% or more of the owners of substantial property interests, it may be presented to the council, who shall fix a date for public hearing thereon, at which time any voter

of the city or any person owning a substantial property interest in the area proposed to be annexed, may appear and be heard. The Council shall cause notice of the hearing to be published once each week for two successive weeks, prior to the date of hearing in a newspaper of general circulation in the city, or if there be no such newspaper in the city, then such notice shall be published in a newspaper nearest to the city proposing such annexation, and shall cause notice of the hearing to be posted in two public places in the city and in two public places in the area proposed to be annexed for a like period. . . .

Section 16-1-29h

The Council of such city shall thereupon submit the question to the electors in the area proposed to be annexed to such city in accordance with its ordinance. Such question shall be submitted at a general or special election to be held for that purpose. . . .

Section 16-1-29i

If it shall appear to the Council from the certificate of election filed as aforesaid that a majority of the votes cast at said election were in favor of annexation, then the Council shall by an Ordinance duly passed, (1) incorporate, and adopt all the terms and conditions upon which the annexation has been agreed to by the Council and ratified by a majority of those voting.

Section 16-1-29l

Any action of the Council shall be subject to review in the appropriate Court in such matters coming within its jurisdiction in the same manner as provided with respect to other actions of law.

ACLA, Cum. Sup. 2A-1-7: *Office of the Governor:*

Third Paragraph:

There is hereby created within the Local Affairs Agency, a Local Boundary Commission consisting of five members for overlapping five year terms, one to be appointed from each of the four major senatorial election districts and one from the State at large who will serve as Chairman. The Local Boundary Commission is hereby vested with the duties, powers and responsibilities involved in making studies of local government boundary problems, developing proposed standards and procedures for changing local boundary lines, holding hearings on proposed boundary changes and in preserving its recommendations to the legislature. . . .

The provisions of the *United States Constitution* involved are as follows:

Article XIV, Section I.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the *privileges* or *immunities* of citizens of the United States: nor shall any State deprive any person of life, liberty or property, without *due process of law:* nor deny to any person within its jurisdiction the *equal protection of the laws.* (Emphasis supplied.)

Article XV, Section I.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by

a State on account of race, color, or previous condition of servitude.

Questions Presented

1. Whether or not the decision of the Court below that dissolution might be effected under the election procedure in one area under the older statute, permitting residents of the area to vote, whereas, dissolution in the other area was by Boundary Commission method, giving the residents no right to vote, amounted to a denial of the equal protection of the laws and worked a violation of the privileges and immunities clause of the Fourteenth Amendment of the United States Constitution?

   a. Whether or not Alaska Compiled Laws, Annotated Cumulative Supplement, Section 16-7-2, 1959 amounted to "special" legislation and therefore void, in view of "general" legislation covering the same subject in ACLA, Cum Sup., Section 16-1-29b, being in full force and effect?

   b. Whether or not ACLA, Cum., Sup., Section 16-7-2, 1959, amounted to unlawful delegation of power and the taking away of the privileges and immunities of the citizens of the area to be annexed?

   c. Whether or not the rights of citizens NOT of the Negro race to vote are secured under the United States Constitution?

Statement of the Case

Despite an approximate decade of elections to determine whether Fairview Public Utility District Number One should be annexed to the City of Anchorage, the vote remained a vehement "No." Therefore, under the Act, Ch. 185, SLA, 1959, effective May 28, 1959, the Boundary Com-

mission on February 2, 1960 recommended to the Alaska State Legislature that Fairview Public Utility District Number One be annexed to the City of Anchorage. On March 11, 1960 the House of Representatives disapproved the recommendation by a vote of 26 to 12 (2 absent). On March 18, 1960, the Senate approved the recommendation of the Local Boundary Commission by a vote of 13 to 6 (1 absent). On March 20, 1960 the City of Anchorage passed an Ordinance declaring Fairview Public Utility District Number One annexed to the City of Anchorage. At no time were any of the residents of either municipal corporation permitted to vote on the annexation.

A declaratory judgment was sought on behalf of the City of Anchorage on or about April 26, 1960, for a determination by the Court that the Fairview Public Utility District Number One was dissolved as a matter of law and that the City of Anchorage was the successor to all of its assets. (Case No. 69, Alaska Supreme Court.)

In order to determine judicially whether the prior statutes premitting annexation by vote of the area involved were still in full force and effect, despite Statehood and the Boundary Commission, a friendly suit was filed by the City of Anchorage, on April 21, 1960, against the City Clerk of the City of Anchorage, requiring him to hold an election for certain citizens of an area known as Spenard Public Utility District, who were interested in bringing their area into the City of Anchorage. (Case No. 70, Alaska Supreme Court.) Attempts by the Fairview Public Utility District Number One citizens to intervene in this suit were denied by the lower Court.

The Court held that the statutes were in full force and effect and that an election should be held. On January 17, 1961, the residents of Spenard voted to remain as a Public Utility District, and were allowed to remain so.

Due to the expiration of terms of certain members of the Fairview Public Utility District Number One Board of Directors, certain taxpayers filed a complaint for a mandatory injunction against the said officers and directors of the Fairview Public Utility District, demanding that they continue their functions and to hold an election of new officers on June 14, 1960. The City of Anchorage, on June 22, 1960 moved to intervene, which was granted by the Court.

In the opinion of the Court, dated July 18, 1960, the Court below held that as a matter of law there was no need for an election of additional directors in the Fairview Public Utility District, since automatically the District was dissolved by the annexation of same to the City of Anchorage on March 20, 1960. It further held that the only additional function was a winding up of the left-over business and that the appointment of a Master was the next step, for a determination of what assets were on hand.

The Court further held that the annexation was valid, despite the denial of rights of the inhabitants to vote, and that the City of Anchorage automatically was the successor to all the Public Utility Districts' assets.

An Appeal to the Alaska Supreme Court was taken on September 9, 1960 from the decision of the lower Court on all three cases, namely, Nos. 69, 70 and 71 of the Alaska Supreme Court.

The judgments of the lower court were affirmed on February 2, 1962.

Questions Presented Are Substantial

A. *The Constitutional Question*

Under the Fourteenth Amendment of the United States Constitution, "no State shall deprive any person of life, liberty, or property without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws." To permit in an arbitrary fashion certain citizens of the State of Alaska to vote and to deny that same right to certain other citizens of the State is violative of this Section of the United States Constitution, as well as of the privileges and immunities clause. *Graham* v. *Folsom*, 200 US 248: *Gomillion et al*, v. *Lightfoot*, 364 US 339: *Colegrove* v. *Green*, 328 US 549: *Western Union Telegraph Co.* v. *Foster*, 247 US 105: *Hague* v. *C.I.O.*, 307 US 496.

We are faced with a rather confused state of the law and the application of same which is definitely unequal. Under such a system any one City could absorb unlimited parts of the State, almost at will. The right of the residents of the particular utility to vote could be given or could be taken away at the pleasure of the Boundary Commission. The legislative power is set out in a negative way. By its failure to act, a legal action would purportedly follow, which amounts to an unlawful delegation of legislative power. There is a failure to set forth adequate standards as to when a choice of this "dual" system of the right to vote will be exercised. This vagueness in itself is enough to rend the act in question unconstitutional. There is a wide discretion left within the Boundary Commission, and in the City Clerk, which makes possible a discrimination against the voters of certain areas which clearly violates the privilege and immunities clause and the equal protection of the laws clause of the Fourteenth Amendment to the

United States Constitution. The Alaska Supreme Court upheld this system, stating that "those who reside or own property in an area which is to be annexed have no right to insist that annexation take place only with their consent." *368P 2d. 546.* (See Opinion).

It is obvious that the Court has been confused, as so aptly pointed out by Justice Frankfurter in *Gomillion* v. *Lightfoot*, 364 US 339, by dicta in *Hunter* v. *Pittsburgh*, 207 US 161 in that the power of the State with reference to boundaries must be exercised with reference to the United States Constitution. *Shapleigh* v. *San Angelo*, 167 US 646: *Mobile* v. *Watson*, 116 US 289: *Shelley* v. *Kraemer*, 334 US 1: *Colegrove* v. *Green*, 328 US 549.

It is contended by the State of Alaska that the Gomillion case does not apply, and Counsel for the City of Anchorage makes mention in his Brief of the fact that the petitioners are of the same race as Appellee. Of course, municipal corporations have no race, or color and by its discrimination against the Fairview Public Utility District Number One, the State of Alaska deprived white and Negro citizens of their right to vote, since white and Negro citizens live in the Fairview area. By the enactment of the Fifteenth Amendment of the United States Constitution, it was the intention of Congress to secure the right to vote to persons previously denied said right but not to in any way lessen that right to persons not of the Negro race. Surely it is not to be seriously insisted by the State of Alaska, that the Gomillion case would only apply where Negroes are concerned. (See dissent of Justice Douglas and Justice Black in *South, et al* v. *Peters*, 339 US 276, *U.S.* v. *Classic*, 313 US 299, *Colegrove* v. *Green*, 328 US 549.

In the case of *Wo* v. *Hopkins, Sheriff*, 118 US 356, the "same naked and arbitrary power" frowned upon by this Court is given to and exercised by the Boundary Commis-

sion in the instant case. In the Fairview annexation matter, the Boundary Commission was allowed to do by indirection what the City of Anchorage, could not directly have done, namely; to annex Fairview without the vote of the residents concerned and over the protests of its inhabitants. Time and time again the vote of the populace was an emphatic, "No". The power given the Boundary Commission amounted to special legislation of a type frowned upon by this Court in *Yick Wo* v. *Hopkins, supra.* By the clear language of the decision in the Fairview annexation case, 368 P2nd, 540, the prior legislation which permitted residents of the utility to be annexed to vote was still in full force and effect. Therefore, this special legislation to annex without a vote amounted to what this Court at Page 368 of the Yick-Wo case called, "class legislation, descriminating against some and favoring others." The Court said further in that case, that if such legislation within the sphere of its operation affects alike all persons similarly situated, there would be no violation. Therefore, to have two approaches to annexation, would fall within the category of a denial of the equal protection of the laws, since no standard is prescribed stating which one would be resorted to at a given time.

The Yick-Wo case explores the right of suffrage at Page 370 and summarizes same in words appropriate to our case. . . . "But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men." For, the very idea that one may be compelled to hold his life, or the means of living, or any

material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

The Courts' Summary of its position at Page 373 is important to the problem here presented: "For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws, which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . ." *Cf Lassiter* v. *North Hampton Election Board*, 360 US 45.

By the enactment of and the arbitrary application of a "special" law for the annexation of Fairview, while admittedly permitting the use of the general law for the annexation of Spenard, a problem violating the privilege and immunities clause of the Fourteenth Amendment to the United States Constitution faces us. See *Sutherland Statutory Construction, Section 2101.* All laws of a general nature must have uniform operation throughout the State or the privileges and immunities clause of the Four-

teenth Amendment will be violated. For under that clause we find the following: Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See *Section 2101, supra.* The subject of "classification" necessitating special and general legislation is well covered in *Williams* v. *Mayor and City Council of Baltimore,* 289 US 36, where Justice Cordoza said, "time with its tides brings new conditions which must be cared for by new laws. Sometimes the new conditions affect the members of a class. If so, the corrected statute must apply to all alike. Sometimes the new condition affects only a few. If so, the correcting statute may be as narrow as the mischief. The Constitution does not prohibit special laws inflexibly and always. It permits them when there are special evils with which the general laws are incompetent to cope. The special public purpose will sustain the special form. . . . The problem in the last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers. Only in the case of plain abuse will there be revision by the courts. . . . If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the Courts may intervene and strike the special statute down . . . if special circumstances have developed of such a nature as to call for a new rule, the special act will stand."

Now we are faced with the question, "What was the justification for the enactment of the special statute taking away the right to vote? What was the reason for the inapplicability of the existing general statute giving the right to vote? How could the two stand on the books at the same time? When would one be used instead of the

other? Does not the presence of the two with probability of inequitable use render the special unconstitutional? Is there not a resultant vagueness on account of a failure to set forth adequate standards?

If the subject matter is arbitrarily limited, the result is identification and not classification and the Act is invalid. Acts purporting to classify by population are invalid if the population group selected is too narrow in its span. *Wayne County Board of Review* v. *Great Lakes Steel Co.*, 300 US 29. ". . . it is clear that the additional elements are used to limit an otherwise general statute to a particular community, *Ward v. State ex re Lea*, 224 Ala 242, 139 So 416, the Special Act is clearly invalid. The over-all effect of the special Act in the case at bar was to limit it to the Fairview community and not apply it to the Spenard community, for which the general act was used.

The Fourteenth Amendment to the Constitution of the United States provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws." This guaranty of equal protection of the laws means the protection of equal laws. *Southern Ry. Co.* v. *Greene*, 216 US 400, 412, 54 L. Ed. 536, 30 Sup. Ct. 287. Class legislation is forbidden by this provision, but classification resting upon reasonable grounds of distinction is valid. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Barbier* v. *Connolly*, 113 US 27, 30, 28 L. Ed. 923, 5 Sup. Ct. 357. State legislatures are permitted a broad discretion in classification in police laws, tax laws, or eminent domain laws without coming in conflict with this clause of the Fourteenth Amendment. Only when the classification is

without any reasonable basis, and does not apply alike to all in the same situation are statutes declared invalid under this clause . . . while reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed and cannot arbitrarily be made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification." Day, J. in *Southern Ry. Co.* v. *Greene*, 216 US 400, 417, 54 L. Ed. 536, 30 Sup. Ct. 287. Likewise, in States that prohibit the passage of special legislation, the Fourteenth Amendment can be invoked in order to obtain Federal jurisdiction. . . . *Weaver* v. *Palmer Bros. Co.*, 270 US 402, 415, 70 L. Ed. 654, 46 Sup. Ct. 320, where the Court said: "The Constitutional guaranties may not be made to yield to mere convenience. . . ."

Although the Boundary Commission was obviously no more than a Committee, it was given such wide, broad powers which could permit it to dissolve a Public Utility, which in Alaska has the power of a municipal corporation, quasi. See *Wood* v. *Gray*, 359 P 2d, 951, 955. We ask the question: how can something so insignificant destroy something so much greater than it is? The Court is asked to judicially notice that in the Act which repealed the one under which Fairview was annexed, provisions of notice and hearing were included, but same were not included in the other. How could a significant step, like the annexation of a whole area, be constitutionally accomplished without some kind of notice to the residents of the area concerned? See *Assigned Car Car Cases*, 274 US 564, 583, 71 L. Ed. 1204, 47 Sup. Ct. 727; *Norwegian Nitrogen Products Co.* v. *United States*, 288 US 294, 77 L. Ed. 796, 53 Sup. Ct. 350.

It is elementary that powers given Administrative Agencies are strictly construed against the powers, as they are purely creatures of the legislature. In numerous cases, a strict interpretation has been adopted where the argument has been made that a statute authorizes an Administrative Agency to exercise powers which tend to interfere with established or traditional property rights; *Interstate Commerce Commission* v. *Northern PR Company*, 216 US 538, the right to free contract, *People* v. *Powell*, 280 Mich. 699, 274, NW 372, 118 ALR 721, or personal freedom and liberty, in *re Smith*, 146 NW 68, 40 NE 497.

Although the rule of non-delegability is expressed in many opinions, the better reasoned cases permit the legislature to condition the operation of the law upon the vote of the people . . . in *re Opinion of the Justices*, 232 Ala 46, 166 SO 706. And this seems proper for, if the Law is complete in itself, there appears no satisfactory distinction between conditioning the operation of the Law on a vote of the people and any other contingency. Usually, however, when such laws are upheld, they anticipate the vote of political subdivisions upon questions primarily of local concern . . . in *re Opinion of the Justices, supra.*

The Justice below obviously based much of his decision on the decision of Judge Folta, a Judge of the Territorial era. It is to be noted that the decision of Judge Folta antedated Statehood and the Alaska Constitution, having been rendered in the year 1954: *Annexation to the City of Anchorage*, 15 Alaska 67, 69, 128 F Supp 717, 718. Only one method of dissolution of public utilities was included in Alaska law at the time, which involved an election. All that Judge Folta did was to order an election for the areas concerned. The long resistance of the Alaska population to the shackles of the City of Anchorage is obvious. The determination of the City of Anchorage to force the surrounding areas to become

a part of it, admitted in the Opinion, of larger areas than Anchorage itself, it also apparent.

However, Article X of the United States Constitution, which provides that "the power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," must not be violated. The interpretation of the Alaskan courts takes the right to vote away from people and therefore is in conflict with the provisions of the United States Constitution.

It is also to be noted that the Alaska Supreme Court Judge stated that he would not pass on whether or not the Statutes pertaining to dissolution by election of a Public Utility District were still valid and in force. Yet further on in the Opinion, we find the following: "Our conclusion is not refuted by a 1953 Statute which provides for the dissolution with consent of the voters when the whole or the integral part of a district becomes annexed to the incorporated city. This has application only where annexation takes place under the petition-election procedure which was the only means of annexation in effect prior to the time the State Constitution became effective." . . . "The State may permit residents of local communities to determine annexation questions at an election. But when this is done, the State is not irrevocably committed to that arrangement. If the citizens of the State, in adopting a Constitution, decided that it is in the public interest to establish another election procedure, there is no constitutional obstacle to that course of action."

It is to be noted that the Alaska Supreme Court Justice stated that he was not obliged to pass on whether or not the Statutes pertaining to dissolution by election of a Public Utility District were still valid and in force. Specifically, he states: "the question therefore is not before us and we

express no opinion concerning it." Yet, on Page 545, we find the following: "Appellants contend that the District was not dissolved when annexation took place; that this could be accomplished only by the election procedure set forth by statute. We disagree. This would defeat the chief purpose of annexation, which was to do away with two separate governments in a single community, and thus avoid multiplication of facilities and services, duplication of tax burdens and inevitable jurisdictional conflict and chaos. When annexation was effected, the District was extinguished, and its property, powers and duties were then vested in the City. Our conclusion is not refuted by a 1957 statute which provides for dissolution with consent of the voters when "the whole or the integral part of a district becomes annexed to an incorporated city. This has application only when annexation takes place under the petition-election procedure, which was the only means of annexation in effect prior to the time when the state constitution became effective. It has no application where annexation takes place, under the different method established by Article X, Section 12 of the constitution.... The State may permit residents of local communities to determine annexation questions at an election. But when this has been done, the State is not irrevocably committed to that arrangement. If the citizens of the State, in adopting a constitution, decide that it is in the public interest to establish another election procedure, there is no constitutional obstacle to that course of action. Those who reside or own property in the area to be annexed no vested right to insist that annexation take place only with their consent...."

The Court erred by holding that a statement of reliance on the Fourteenth and Fifteenth Amendments of the United States Constitution failed to inform opposing party and the Court of matters to be decided. Any Court or law in

the United States is charged with knowledge of the provisions of the United States Constitution and they are indelibly written by implication into the laws and the constitution of every state. The inalienable rights covered by the Fourteenth and Fifteenth Amendments are too vital to require a claim made thereunder to set out more than the rights secured thereby.

The Court does admit that a question to be decided by it is whether or not the annexation and dissolution of the district effected without the consent of the voters in the district deprive the Appellants of any rights protected by the Fourteenth and Fifteenth Amendments to the Federal Constitution. (It is noted that there is a failure, on Page 542, to capitalize federal or constitution, but obviously the United States Constitution is referred to.)

The Court contends on Page 545 that "appellants do not point out nor do we perceive in what respect there has been a deprivation of liberty, or property, without due process of law." However, in the paragraph just above that, at Page 545, we find the following: "Appellants next contend that their constitutional rights were violated when they were not permitted to hold an election and vote as to whether annexation should take place. They rely specifically on the due process clause of the Fourteenth Amendment and on the Fifteenth Amendment as applied in the recent case of *Gomillion* v. *Lightfoot*."

With these two conflicting statements before us, the error of the Court is apparent. The Court is asked to take judicial notice of the fact that these cases were handled by laymen. However, the clear manner in which the Constitutional question was raised is a compliment to the way in which our Constitutional rights have been engrained in our American way of thinking. Admittedly, the privileges and immunities clause of the Fourteenth Amendment could more aptly

cover the right to vote. But once the Fourteenth Amendment is before a Court, all of its aspects are to be considered. As previously stated, herein, the statute under which the annexation was handled was a special one, despite the fact that a general one remained on the books. The general one permitted a vote and the residents of the Spenard Utility District voted to remain outside the City of Anchorage, as the residents of the Fairview Public Utility District Number One had always done in the past. The obvious discrimination against the residents of Fairview, forcibly brought in under the special statute, and denied their right to vote by this Act, should have left no doubt in the Court's mind as to how the Appellants had been discriminated against.

Included in "liberty" is the right to vote.

Conclusion

In view of the violations of the privilege and immunities clause and the equal protection of the laws clause of the Fourteenth Amendment, it is submitted that there can be no valid annexation of the Fairview Public Utility District Number One to the City of Anchorage, in this case. Since the Alaska constitution guards against enactment of special legislation where general legislation is available to cover the subject, and the Fourteenth Amendment of the Constitution of the United States forbids special legislation except in extremely rare types of circumstances, not present here, the section under which the Fairview Public Utility District Number One was annexed, namely Ch. 185, Sec. 2, 1959 was void at the time of its use. The fact that that section was repealed shortly thereafter by Ch. 45, SLA 1960 bolsters the argument for its unconstitutionality. Nevertheless, its subsequent repeal by no means lessen the gravity of the error already committed while it was alive. The

double standard for annexation permitted by co-existence in the Law of two methods, one permitting the right to vote, the other taking that right away, with no prescribed standard as to the types of circumstances under which one or the other would be used, is clearly violative of equal protection of the laws and is unconstitutional. The indiscreet delegation of power to the Boundary Commission coupled with the taking away of the inalienable right of suffrage amounted to a violation of the privileges and immunities clause of the Fourteenth Amendment. It is submitted that the passage of the Fourteenth and Fifteenth Amendments merely codified existing rights to United States citizens, and that the right to vote of the Fifteenth Amendment was not meant to indicate that only Negroes would have this unfettered freedom.

Dated At Anchorage, Alaska this 25 day of June, 1962.

Respectfully submitted,

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APPENDIX

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 69

FAIRVIEW PUBLIC UTILITY DISTRICT NUMBER ONE, WILLIAM E. MOORE, FERN WILLIAMS, GLENN H. EAGON, AL OTTER, AND PAULINE TRUEX, *Appellants*,

v.

CITY OF ANCHORAGE, A MUNICIPAL CORPORATION, *Appellee*.

File No. 71

LAWRENCE HAWK, ET AL., *Appellants*,

v.

FAIRVIEW PUBLIC UTILITY DISTRICT NUMBER ONE, ET AL., AND CITY OF ANCHORAGE, A MUNICIPAL CORPORATION, *Appellees*.

Appeals From the Superior Court, Third District, Edward V. Davis, Judge

[No. 61—February 2, 1962]

OPINION

Appearances: Pauline Truex, in pro. per., Anchorage, for Appellants in No. 69, and Leonard J. Grau, in pro. per., Anchorage, for Appellants in No. 71. Richard O. Gantz, Onchorage, for Appellee, City of Anchorage.

Before: NESBETT, Chief Justice, and DIMOND and AREND, Justices.

DIMOND, Justice: These appeals concern the validity of the annexation of the Fairview Public Utility District to the City of Anchorage.

Following a constitutional directive,[1] the legislature in

[1] Alaska Const. art. X, § 12.

1959 established a Local Boundary Commission.[2] It was authorized to consider and recommend to the legislature any proposed local government boundary change, which would become effective no later than the end of the legislative session unless disapproved by a resolution concurred in by a majority of the members of each house.[3]

In 1960 the Commission presented to the legislature its recommendation that the Fairview Public Utility District, an area entirely surrounded by the City of Anchorage, be annexed to the city.[4] The House passed its concurrent resolution disapproving the proposed boundary change.[5] The Senate, however, refused to concur in the resolution of disapproval.[6] This meant, in the language of the constitution and the statute, that the annexation became "effective" by the end of the legislative session, if not earlier.[7]

Following the adjournment of the legislature, the city commenced this action for a declaratory judgment. It asked the court to determine that the District had been dissolved, that the city was the legal successor to all assets of the District, and that a date be set for winding up all affairs of the District and transferring its assets to the city. The complaint also sought to restrain the District and its board of directors from incurring any further obligations without the city's written consent. The defense primarily relied upon was that the failure of the

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[2] SLA 1959, ch. 64, § 7 (§ 2A-1-7 ACLA Cum. Supp. 1959).

[3] Alaska Const. art. X, § 12; SLA 1959, ch. 185, § 2 (§ 16-7-2 ACLA Cum. Supp. 1959). The 1959 act was repealed and superseded by SLA 1960, ch. 45.

[4] Local Boundary Committee, Proposed Boundary Change, Recommendation No. 2. 1960 Alaska House Journal 64-65.

[5] House Concurrent Resolution No. 36, 1960 Alaska House Journal 477.

[6] The resolution was indefinitely postponed by the Senate on March 18, 1960. 1960 Alaska Senate Journal 598.

[7] In identical language both the constitution (Art. 10, § 12) and the statute then in effect (SLA 1959, ch. 185, § 1) provided that a proposed boundary change "shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house." It is not material in this case to decide whether the effective date of the change was earlier than March 29, the end of the legislative session.

legislature to disapprove the Commission's recommendation for annexation could not effect the dissolution of the District, since a dissolution could be validly effected only by the consent of the voters within the District pursuant to an election held in accordance with statute.[8]

The court entered a summary judgment, holding that the District had been validly annexed to the city, and was dissolved as a matter of law at the time of annexation. The court determined that the city was the legal successor to the District—entitled to all of its assets and charged with it liabilities and governmental functions. A master was appointed to determine the assets and liabilities, and the District's board of directors was ordered, after such determination had been made, to pay the District's outstanding obligations and to transfer any remaining assets to the city.

It is difficult to determine what appellants specifically rely upon as error. The statement of points on appeal, required by Supreme Court Rule 9(e), merely says in broad terms that the appellants "intend to rely upon" the Fourteenth and Fifteenth Amendments to the federal constitution, and upon the Supreme Court's decision in *Gomillion v. Lightfoot*.[9] Such a statement does not serve the purpose of the rule, for it fails to inform the opposing party and the court of matters we shall be called upon to decide.

The appellants' brief is not particularly enlightening, because it does not contain a specification of errors as required by rule.[10] It poses five questions under the heading

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[8] Section 49-2-13 ACLA Cum. Supp. 1957 allows the dissolution of public utility districts in various circumstances, one of which is when "the whole or the integral part of a district becomes annexed to an incorporated city." The procedure to be followed is that established for the dissolution of municipal corporations by § 16-1-5 ACLA 1949. That statute calls for an election and requires a plurality of three-fifths of the votes cast to effect dissolution.

[9] 364 U.S. 339, 5 L. ed. 2d 110 (1960).

[10] Supreme Ct. R. 11(a)(6) provides in part that the appellant's brief shall contain "a specification of errors relied upon which shall be numbered

"Issues Presented",[11] but certain of those questions are beyond the issues properly presented to us for decision. Because of this, we consider it important at the outset to state explicitly what is before us for review and what is not.

In the first place, we are not required to decide whether the court had the authority to appoint a receiver for the District. If one had been appointed, there would be a question as to the propriety of such action.[12] But the court did not appoint a receiver; instead it appointed a master. He was not to exercise any governmental function of the District, but was authorized only to make investigations, find facts, and make reports to the court. This was within the proper scope of a master's functions and powers as provided by rule.[13]

Neither are we obliged to determine whether the statutes pertaining to the dissolution of a public utility district are still valid and in force. The court below held that the District had been dissolved as a matter of law when annexation took place, and that this occurred when the legislature failed to disapprove the Commission's recommendation for

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and shall set out separately and particularly each *error* intended to be urged . . . When findings are specified as *error*, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be *erroneous*."

[11] These read as follows:

1. Was the purported annexation of the Fairview Public Utility District, Number One, to the City of Anchorage legal and in accordance with law?

2. Did the Court have the authority to appoint a receiver for the Fairview Public Utility District?

3. Did the City have the authority to commence municipal proceedings without an election showing consent by the people of the area affected?

4. Did the City of Anchorage have the authority to encumber the real and personal property of the people in the Fairview Public Utility District, without their consent?

5. Are the statutes pertaining to the dissolution of any Public Utility District valid and in force?

[12] In *Wood v. Gray*, No. 41, 359 P. 2d 951, 955 (Alaska 1961), we held that the court did not have authority to appoint a receiver for a public utility district.

[13] Civ. R. 53.

annexation. It was unnecessary for the court to decide whether dissolution might also have been effected under the election procedure provided by statute.[14] The question is therefore not before us, and we express no opinion concerning it.

From an examination of the remaining "issues presented", the statement of points, and the argument in the brief, we believe that there are three questions appropriately before us for decision: (1) whether the Boundary Commission could validly exercise the powers conferred upon it; (2) whether the District was dissolved when annexed to the city; and (3) whether the annexation and dissolution of the District, effected without the consent of the voters within the District, deprived the appellants of any rights protected by the Fourteenth and Fifteenth Amendments to the federal constitution.

The first question has to do with Article X of the state constitution. Its purpose, as stated in Section 1, is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. In Section 2 it is stated that all local government powers shall be vested in boroughs and cities. The sections that follow provide for the establishment of organized and unorganized boroughs, for the incorporation and government of cities, and for the relationships that are to exist between these two units of self-government. Section 12 calls for the establishment of a local boundary commission, and defines the powers it is to have. The last section provides that special service districts existing at the time a borough is organized shall be integrated with the government of the borough as provided by law.

From these provisions appellants argue that the Local Boundary Commission was not intended to function as it did here until such time as boroughs had been established and necessary legislation had been enacted for integration of existing special service districts with borough government. It would be only after those events had taken place,

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[14] Section 49-2-13 ACLA Cum. Supp. 1957, supra note 8.

appellants contend, that the Boundary Commission could consider and present to the legislature proposed local government boundary changes. In the intervening period, a boundary change resulting from annexation of a special service district to a city could be accomplished only by the petition-election procedure provided by a law enacted prior to the effective date of the constitution.[15]

That construction of Article X is neither required by the plain language of the constitution nor suggested by the proceedings of the constitutional convention. Section 12 says that a local boundary commission shall be established by law in the executive branch of the state government, that it may consider any proposed local government boundary change, and that it may present proposed changes to the legislature. It does not say that these things were not to take place until certain other events had occurred, such as the establishment of boroughs.

The convention proceedings militate against the position adopted by appellants. Article X was drafted and submitted by the Committee on Local Government, which held a series of 31 meetings between November 15 and December 19, 1955. An examination of the relevant minutes of those meetings shows clearly the concept that was in mind when the local boundary commission section was being considered: that local political decisions do not usually create proper boundaries and that boundaries should be established at the state level.[16] The advantage of the method proposed, in the words of the committee—

> . . . lies in placing the process at a level where area-wide or state-wide needs can be taken into account. By placing authority in this third-party, arguments

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[15] SLA 1957, ch. 183 (§§ 16-1-29–29n ACLA Cum. Supp. 1957), as amended, SLA 1959, ch. 103 (§ 16-1-29h ACLA Cum. Supp. 1959).

[16] Alaska Constitutional Convention, Minutes of Committee on Local Government, Nov. 28 and Dec. 4, 1955. (This and all subsequent statements and quotes concerning proceedings of the Alaska Constitutional Convention refer to Records of the Alaska Constitutional Convention, now in the custody of the Secretary of State, Juneau, Alaska.)

> for and against boundary change can be analyzed objectively.[17]

This expressed need for state adjustment of local boundaries was of immediate concern, and not something that the delegates considered would arise only after a borough government had been formed.[18] Following World War II the City of Anchorage, the largest municipality in Alaska, experienced such a rapid growth that it soon outgrew its boundaries, and the population of adjacent and contiguous areas became greater than that of the city. This resulted in efforts by the city to annex a number of these heavily populated and unincorporated areas. Those efforts were met by the most determined opposition. In a 1954 case involving the attempted annexation of adjacent territory, Judge Folta remarked:

> Every impediment and dilatory tactic has been employed by the opponents of annexation, except the homesteaders, to obstruct and harass the city in every move in connection with its efforts to extend its boundaries in the traditional manner to include the adjacent areas. Such oppisition does not appear to be in the public interest or in good faith.[19]

In 1955 there were petitions for the annexation of three additional areas adjacent to the city. Again there were protests and concerted opposition, which required determination by the Territorial District Court. In his written opinion Judge Folta commented on the history of the growth

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[17] Alaska Constitutional Convention, Commentary on Proposed Article on Local Government, Dec. 19, 1955 at 6.

[18] Alaska Const. art. X, § 3, states in the first sentence "The entire state shall be divided into boroughs, organized or unorganized." It was not until 1961 that the legislature enacted a statute providing for the establishment of boroughs. SLA 1961, ch. 146 effective Oct. 1, 1961.

[19] Annexation to the City of Anchorage, 15 Alaska 67, 69, 128 F. Supp. 717, 718 (D. Alaska 1954).

of urban areas, and the deficiencies in existing procedures for annexation. He said:

> The areas sought to be annexed are a part of one compact, urban community comprising the metropolitan area of Anchorage, and except for the invisible corporate boundaries, are a part of the city's social and economic existence. The real boundaries extend away beyond the corporate boundaries. Moreover, not only do the streets of the city extend through these areas, but they bear the names originally given them by the city and the areas themselves are indistinguishable from that part of the city adjacent thereto. The opposition in part is traceable to the failure of the city during the boom to extend its facilities and services into the areas as they developed. This delay resulted in the extension of privately owned utilities and the organization of public utility districts. The situation is such that the annexation law appears to be inadequate, and gerrymandering, or the appearance thereof, would appear to be excusable in attempting to cope with it; otherwise it may well develop that several municipalities will be carved out of this one community, each with a government of its own, resulting in a multiplication of facilities and services, increased tax burdens, and inevitable jurisdictional conflict and chaos. Henrico County, Windsor Farms, Inc. v. City of Richmond, 177 Va. 754, 760, 15 S. E. 2d 309. The Court is not going to lend itself to the imposition of a hydraheaded government on the people of a single urban area unless it has no alternative under the law.[20]

Rejecting the arguments in opposition, the court ordered an annexation election "so that the people may determine for themselves whether the City of Anchorage is to be allowed to expand in the traditional manner or be put in a strait jacket."[21]

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[20] In re Annexation to City of Anchorage, 15 Alaska 504, 509, 129 F. Supp. 551, 554 (D. Alaska 1955).

[21] Id. at 510 (129 F. Supp. at 554).

We cannot assume that when the delegates to the constitutional convention assembled later in 1955, they were unaware of these obstacles faced by Alaska's cities. We cannot assume that they were insensitive to the inadequacies inherent in a system where needed municipal expansion could be frustrated if the electors in a single urban area outside of municipal boundaries did not agree to annexation.[22] In the light of these contemporary realities, we cannot assume that the adjustment of local boundaries at a state level was intended to be delayed pending the formation of boroughs. We must assume that the convention would have used specific language to accomplish that result. We hold that the method for making boundary changes, contemplated by Article X, Section 12 of the constitution, was operative upon the enactment of the 1959 statutes creating a Local Boundary Commission[23] and conferring powers upon it.[24]

Appellants contend that the District was not dissolved when annexation took place; that this could be accomplished only by the election procedure set forth by statute.[25] We disagree. This would defeat the chief purpose of annexation, which was to do away with two separate governments in a single community, and thus avoid multiplication of facilities and services, duplication of tax burdens, and inevitable jurisdictional conflict and chaos.[26] When annexation was effected the District was extinguished, and its property, powers and duties were then vested in the city.[27]

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[22] In 1955 a proposal for annexation would be defeated if at least fifty-five percent of the votes cast in the area sought to be annexed were not in favor of the proposal. SLA 1951, ch. 7, § 2. In 1957 this was changed to fifty percent. SLA 1957, ch. 183, § 10 (§ 16-1-26 ACLA Cum. Supp. 1957).

[23] SLA 1959, ch. 64, § 7 (§ 2A-1-7 ACLA Cum. Supp. 1959).

[24] SLA 1959, ch. 185 (§ 16-7-2 ACLA Cum. Supp. 1959).

[25] Section 49-2-13 ACLA Cum. Supp. 1957, supra note 8.

[26] In re Annexation to City of Anchorage, 15 Alaska 504, 509, 129 F. Supp. 551, 554 (D. Alaska 1955).

[27] In re Sanitary Board of East Fruitvale Sanitary Dist., 158 Cal. 453, 111 Pac. 368, 370 (1910); Dickson v. City of Carlsbad, 119 Cal. App. 2d 809, 260 P. 2d 226 (1953).

Our conclusion is not refuted by a 1957 statute which provides for dissolution with consent of the voters when "the whole or the integral part of a district becomes annexed to an incorporated city."[28] This has application only where annexation takes place under the petition election procedure,[29] which was the only means of annexation in effect prior to the time the state constitution became effective.[30] It has no application where annexation takes place under the different method established by Article X, section 12 of the constitution.

Appellants next contend that their constitutional rights were violated when they were not permitted to hold an election and vote as to whether annexation should take place. They rely specifically on the due process clause of the Fourteenth Amendment, and on the Fifteenth Amendment as applied in the recent case of *Gomillion v. Lightfoot*.[31]

Appellants do not point out, nor do we perceive, in what respect there has been a deprivation of "liberty, or property, without due process of law."[32] The determination of what portions of a state shall be within the limits of a city involves an aspect of the broad political power of the state which has always been considered a most usual and ordinary subject of legislation.[33] The state may permit residents of local communities to determine annexation questions at an election. But when this has been done, the state is not irrevocably committed to that arrangement. If the citizens of the state, in adopting a constitution, decide that it is in the public interest to establish another election procedure, there is no constitutional obstacle to that course of action. Those who reside or own property in the area to be annexed have no vested right to insist that annexation take place only with their consent. The subject of expansion

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[28] SLA 1957, ch. 139 (§ 49-2-13, First. ACLA Cum. Supp. 1957).

[29] SLA 1957, ch. 193 (§§ 16-1-29–29r ACLA Cum. Supp. 1957).

[30] The state constitution went into effect on January 3, 1959.

[31] 364 U.S. 339, 5 L. ed. 2d 110 (1960).

[32] U.S. Const. amend. XIV, § 1.

[33] *Kelly v. City of Pittsburgh*, 104 U.S. 78, 81, 26 L. ed. 658, 659 (1881); 1 Antieau, Municipal Corporation Law § 1.15 at 30 (1958).

of municipal boundaries is legitimately the concern of the state as a whole, and not just that of the local community.[34] There has been no infringement or deprivation of rights protected by the Fourteenth Amendment.

The Fifteenth Amendment and the Supreme Court's decision in the *Gomillion*[35] case are not pertinent. They are concerned with the denial of a citizen's right to vote because of his race or color. That factor is not involved in this case.

In a companion case (No. 71) a number of residents of of the District commenced an action against the District and its board of directors to compel the latter, by mandatory injunction, to hold an election in order that new directors could be elected—the terms of the others having expired. The City of Anchorage moved to intervene, claiming that because the District had been annexed to the city and thus dissolved by operation of law, no purpose could be served by the election of new directors who would have no functions to perform. The court dismissed the action, holding that its decision in the prior action brought by the City for a declaratory judgment was controlling.

What we have said above as to the validity and effect of the annexation of the Fairview District to the City of Anchorage disposes of this second appeal. There would be no sense in requiring the election of a board of directors for a public utility district which no longer was in existence.

The judgments are affirmed.

(2857-1)

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[34] Cf. *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 52 L. ed. 151 (1907); *Mount Pleasant* v. *Beckwith*, 100 U.S. 514, 524-525, 25 L. ed. 699, 701 (1880).

[35] *Gomillion* v. *Lightfoot*, 364 U.S. 339, 5 L. ed. 2d 110 (1960).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 223

FAIRVIEW PUBLIC UTILITY DISTRICT, No. 1, WILLIAM E. MOORE, FERN WILLIAMS, GLENN H. EAGON, AL OTTER, PAULINE TRUEX,

Appellants,

vs.

CITY OF ANCHORAGE, a municipal corporation,

Appellees

LAWRENCE E. HAWK, et al,

Appellants,

vs.

FAIRVIEW PUBLIC UTILITY DISTRICT, No. 1 et al; and the CITY OF ANCHORAGE, a municipal corporation,

Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 223

FAIRVIEW PUBLIC UTILITY DISTRICT, No. 1, WILLIAM E. MOORE, FERN WILLIAMS, GLENN H. EAGON, AL OTTER, PAULINE TRUEX,

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

MOTION TO DISMISS OR AFFIRM

Appellees, City of Anchorage, pursuant to Rule Sixteen of the Revised Rules of this Court, move to dismiss or affirm the appeal in each of the above entitled cases on the grounds:

A. That the appeal is not within the jurisdiction of this Court because not taken in conformity to statute or rule.

B. The federal questions sought to be raised were not timely or properly raised in the state court below.

C. No substantial federal question is presented.

QUESTIONS PRESENTED

1. Whether federal questions which are not raised in the pleadings in the trial court but are mentioned in unspecific broad terms in briefs in the Supreme Court of Alaska can be a basis for review jurisdiction in this Court?

2. Whether, in light of the fact that the Appellants failed to raise any federal questions in the trial court and the arguments raised in the State Supreme Court concerning the right to vote and due process were not ruled upon by the State Supreme Court, the Appellants can now, for the first time, come forward with questions of equal protection and privileges and immunities?

3. Whether annexation of territory to the City of Anchorage by state legislative act deprives residents of the annexed territory of a federally guaranteed right to vote on that annexation?

STATEMENT OF THE CASE

The two cases under consideration are companion appeals from a final judgment and decision of the Supreme Court of the State of Alaska affirming the judgments of the Superior Court of the State of Alaska. They involve annexation of adjacent lands to the City of Anchorage, Alaska.

Two distinct methods for altering the boundaries of political subdivisions have been provided by state

statute; the local petition-election method,[1] and a legislative action procedure as established by constitutional mandate. The latter involves action through the State Legislature upon recommendation of the State Boundary Commission.[2]

During March of 1960, three vestigial islands as illustrated by the map of the City of Anchorage and the Fairview Public Utility District, Appendix IV, *infra*, were annexed to the City of Anchorage by the State Legislature. The procedure does not provide for a vote by the residents. Thereafter, Appellee commenced an action against the Fairview Public Utility District and its Board of Directors for declaratory judgment asking, among other things, that the Court determine the District had been dissolved as a result of the annexation. The companion case of *Hawk, et al* v. *Fairview Public Utility District, No. 1, et al* was commenced by individuals opposing the boundary change and seeking to compel an election in order that new directors for the Fairview Public Utility District might be elected, the terms of the previous board members having expired. The litigation, as developed, centered on the desire of the persons opposing the

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[1] Session Laws of Alaska, 1957, Ch. 183, §16-1-29n, ACLA Cum. Supp. (1959)

[2] Alaska Const. Art. X, §12; Session Laws of Alaska, 1959, Ch. 64 §2A-17, ACLA Cum. Supp. (1959) and Session Laws of Alaska, 1959, Ch. 185. The text of Art. X, Sec. 12 of the Alaska Constitution is misquoted on page 5 of Appellants' Jurisdictional Statement, but is set forth in full in Appendix I, *infra*. Note that while Session Laws of Alaska, 1960, Ch. 45 post-dated this case, and did repeal Session Laws of Alaska, 1959, Ch. 185 as mentioned on page 6 of Appellants' Statement, it also re-enacted the same provisions, both acts being set forth *in full* in Appendix II and III, *infra*.

boundary change to vote on the question of annexation. In this connection, the question of whether the statute providing for annexation on the recommendation of the boundary commission through the state Legislature was operative under the Alaskan Constitution was argued in various cases. The trial court disposed of the two cases together; the statute was found operative as a matter of state law, the dissolution was declared, and the request for an election of a further Board of Directors was denied.

No federal questions were raised in the pleading nor were facts on which to base a federal claim revealed in the trial court; no challenge was made concerning repugnancy of the statute under which the Boundary Commission acted as related to the United States Constitution. On appeal to the Supreme Court of the State of Alaska, "right to vote" was mentioned in argument and lack of "due process" was also mentioned in the briefs.[3] The application of these concepts and facts upon which to base a claimed deprivation, were not presented.

ARGUMENT

I. The Appeal Is Not Within The Jurisdiction Of This Court Because Not Taken In Conformity To Statute Or The Rules Of This Court

Appeal is sought here as of right in reliance upon 62 Stat. 929, 28 U.S.C. §1257(2) (1948), but a direct challenge to the constitutionality of the Statute creating and empowering the Boundary Commission was not properly presented to the state court nor ruled upon by it.[4]

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[3] See Appellants' Brief in State Supreme Court, Case No. 69, at p. 19 and in Case No. 71, at pp. 36-40, Appendices V and VI, *infra*.

[4] Opinion, Appellants' Appendix, pp. 32-34, 39-40.

II. Federal Questions Sought To Be Raised Were Not Timely Or Properly Raised In The Court Below

No federal question was ever mentioned in the Superior Court for the State of Alaska, the first occasion being in argument on appeal to the Alaska Supreme Court where a "right to vote" and "due process" were suggested.[5] *Gomillion* v. *Lightfoot*, 364 U.S. 339 was miscited by Appellants and mentioned by the State Supreme Court only to show its inapplicability. Now, for the first time, questions including privileges and immunities and equal protection are raised, never having been presented for ruling below. This Court in innumerable decisions has held it is too late to raise federal questions for the first time in this Court. *White River Lumber Company* v. *Arkansas, ex rel*, 279 U.S. 692, 699-700; *C.I.O.* v. *McAdory*, 325 U.S. 472, 477; *Edelman* v. *California*, 344 U.S. 357.

III. No Substantial Federal Question Is Presented

The questions presented on page 14 of Appellants' Statement are either not federal, or not substantial. The State Courts have interpreted the State Statutes to provide two different methods for changing boundaries, one by local action one by state action.[6] The State Court has specifically ruled that there is no "right to vote" by the inhabitants of an annexation area when the procedure adopted is the State legislature method, and this ruling is independently supported on state grounds.[7] This has long been recognized as a

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[5] Appellants' Brief in State Supreme Court of Alaska, No. 69 at p. 19 and No. 71 at pp. 36-40, Appendices V and VI, *infra*.

[6] Opinion, Appellants' Appendix, p. 39.

[7] Opinion, Appellants' Appendix, p. 39.

non-federal area in the absence of abuses generally involving the impairment of contracts, economic disadvantage or discrimination.[8] In the instant case no abuses are claimed and none in fact exist. Scattered islands composing the entire Fairview Public Utility District were incorporated into the single surrounding governmental unit.

The provision of the State Constitution when enacted in statutory form cannot seriously be labeled as special legislation or such an unlawful delegation as to raise a federal question. Other purely state questions are also presented and appellants desire this Court to rule that ordinary geographic redistricting cannot be accomplished in the absence of consent of the inhabitants secured through an election. This is a state political question in the classic sense. Because the local petition method incorporates an election procedure and likewise was found operative in a separate proceeding not on appeal here, Appellants conceive a "right to vote" must also attach to the State Legislature method or they will be treated "unequally," and denied "privileges and immunities." These concepts as historically understood do not raise substantial questions when applied to the circumstances of these cases, all persons similarly situated having been treated equally. It is conceded that no racial discrimination occurred; the rights of citizens "not of the negro race" to receive constitutional protection cannot seriously be open to substantial questioning.

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[8] *Kelly* v. *City of Pittsburgh*, 104 U.S. 78; *Hunter* v. *City of Pittsburgh*, 207 U.S. 161; *Mount Pleasant* v. *Beckworth*, 100 U.S. 514.

CONCLUSION

There is no absolute "right to vote" on an ordinary geographic redistricting when the State Statute does not provide for an election. There is no circumvention of a federally protected right, privilege or immunity when a geographical area is unified under a single government subdivision by elimination of islands which compose the entire remainder of the one district, incorporating the islands into a second area. It is a matter of State concern, and the decision is adequately supported on State grounds.

It is respectfully submitted that the appeals should be dismissed.

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APPENDIX I

CONSTITUTION OF THE STATE OF ALASKA: ARTICLE X

LOCAL GOVERNMENT

Section 12. *Boundaries.* A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

APPENDIX II

1960 SESSIONS LAWS OF ALASKA, CHAPTER 45

AN ACT

Relating to the duties and powers of the Local Boundary Commission and procedures for the exercise of those duties and powers; repealing Ch. 185, SLA 1959; and providing for an effective date.

Be it enacted by the Legislature of the State of Alaska:

Section 1. *Purpose.* The purpose of this Act is to establish the duties and powers of the Local Boundary Commission, procedures for the exercise of those duties and powers, and to direct a study for the organization of boroughs and the integration of existing special districts.

Section 2. *Duties and Powers.* The commission has the following duties and powers:

(1) It may conduct meetings and hearings for the purpose of considering local government boundary changes and other matters related to local government boundary changes;

(2) It may present proposed local government boundary changes to the legislature during the first ten days of any regular session. The change shall become effective 45 days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house;

(3) It shall consider any local government boundary change requested of it by the legislature, the director of local affairs, or a political subdivision of the state;

(4) No local government boundary change may be proposed to the legislature unless a hearing on the change has been held in or in the near vicinity of the area affected by the change.

Section 3. *Meetings and Hearings.* a. Meetings and hearings may be called by the chairman of the commission or by the director of local affairs with the concurrence of the chairman.

(1) All meetings and hearings of the commission shall be public.

(2) Minutes shall be kept for all meetings and hearings unless the entire proceedings are transcribed, in which case minutes shall be made from the transcription. All minutes are a matter of public record.

(3) All votes taken by the commission shall be entered in the minutes.

(4) Public notice of any hearing shall be made in the area in which the hearing is to be held at least 15 days before the date of the hearing and the notice shall include the time, date, place and subject of the hearing. The director of local affairs shall give notice of the

hearing at least three times in the press or through other news media or by posting in a public place, whichever is most feasible.

b. Three members of the commission constitute a quorum for the conduct of busines at a meeting and two members constitute a quorum for the conduct of business at a hearing, provided that a majority of the membership of the commission must vote in favor of a proposed boundary change before it may be presented to the legislature.

Section 4. *Pay.* Members of the commission receive no pay but shall receive travel expenses and per diem as is authorized for members of boards and commissions.

Section 5. *Repeal.* Ch. 185, SLA 1959 is repealed.

Section 6. *Effective Date.* This Act takes effect on the day after its passage and approval or on the day it becomes law without such approval.

APPENDIX III

1959 SESSION LAWS OF ALASKA, CHAPTER 185

(Sections 16-7-1, 2, 3, ACLA Cum. Supp., 1959)

AN ACT

Relating to the powers of the Local Boundary Commission; providing for an effective date.

Be it enacted by the Legislature of the State of Alaska:

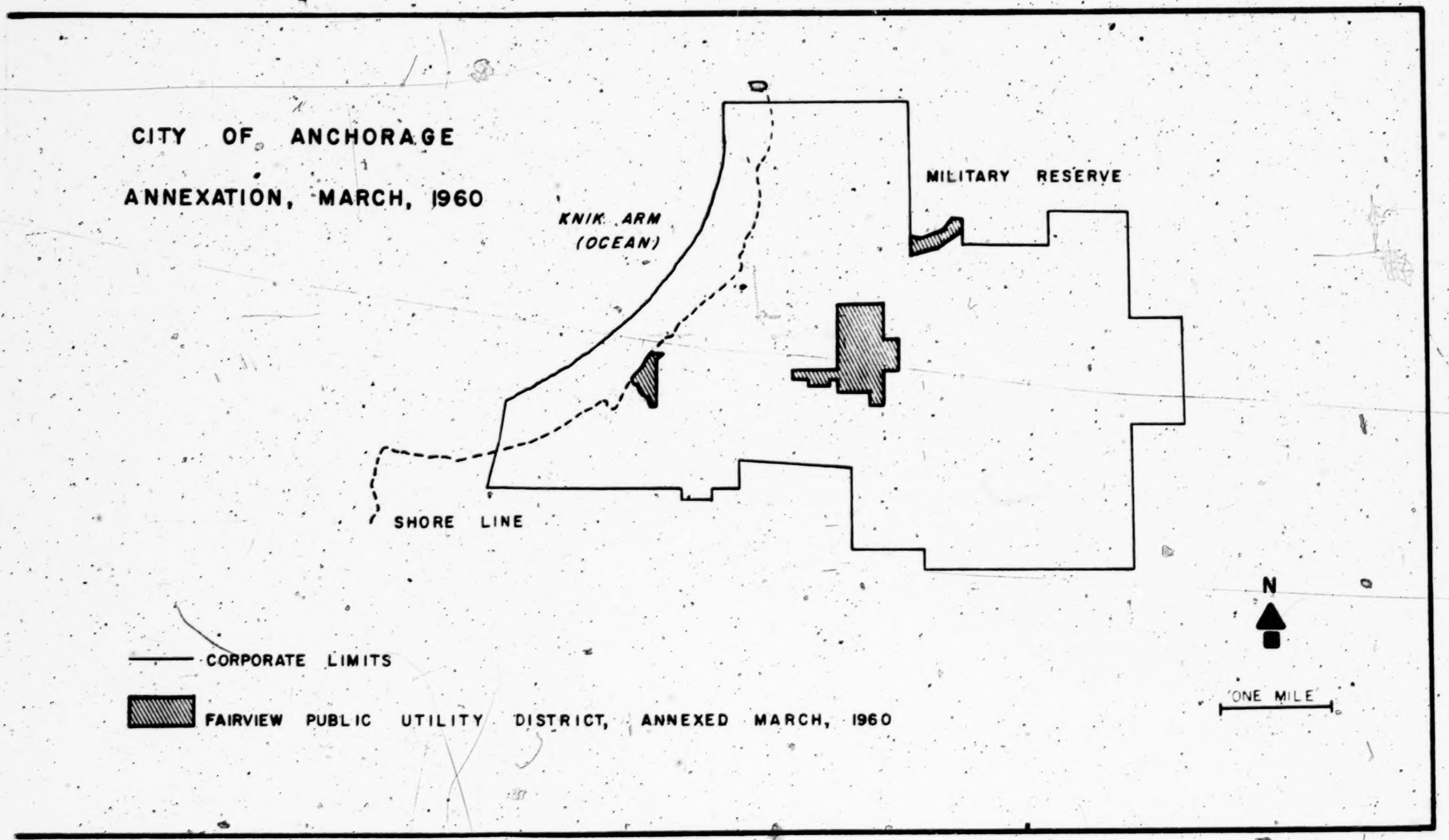
Section 1. *Commission Defined.* The Local Boundary Commission created by the State Organization Act of 1959 is the commission referred to in this Act.

Section 2. *Powers.* The commission may consider any local government boundary or any proposed local government boundary change and exercise such other powers as may be prescribed by law. It shall present proposed local government boundary or local government boundary changes to the legislature during the first ten days of any regular session. The boundary

or boundary change as recommended shall become effective forty-five days after presentation to the legislature or at the end of the legislative session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house of the legislature. Cities shall have such powers regarding boundaries as conferred on them by general law. The commission may recommend to the legislature the procedures whereby a local government boundary may be adjusted by local action.

Section 3. *Meetings; Quorum.* The commission shall meet at such times and such places as may be necessary to carry out the purpose of this Act. A majority of the full membership of the commission shall constitute a quorum to transact business; provided, that it shall take an affirmative vote of the majority of the membership to carry all decisions on proposals.

Section 4. *Effective Date.* This Act shall take effect immediately upon its passage and approval or upon its becoming law without such approval.


CITY OF ANCHORAGE
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CORPORATE LIMITS
FAIRVIEW PUBLIC UTILITY DISTRICT, ANNEXED MARCH, 1960

APPENDIX V

IN THE SUPREME COURT OF THE STATE OF ALASKA

No. 69

FAIRVIEW PUBLIC UTILITY DISTRICT NUMBER ONE, WILLIAM E. MOORE, FERN WILLIAMS, GLENN H. EAGON, AL OTTER, and PAULINE TRUEX,

Appellants

vs.

CITY OF ANCHORAGE, a municipal corporation,

Appellees

Statement of the Case

This case has been brought to the Supreme Court of the State of Alaska on appeal from the Superior Court, Third Judicial District, Anchorage, Alaska not only as a matter of appeal from an adverse decision, but also as a matter of law in which even the presiding Judge stated that the question should properly be settled in the Supreme Court.

The issue arises from the purported annexation of the area known as the Fairview Public Utility District Number One by the City of Anchorage as of March 20, 1960.

The litigation sets forth the direct conflict between two municipal corporations engaged in an irreconcilable conflict as to which of the two is entitled to exercise proper legal jurisdiction over certain territory.

The complaint filed by the Appellees, hereinafter known as the City of Anchorage, sets forth the fact that the City of Anchorage is a municipal corporation duly organized and existing under the laws of the State of Alaska and the Appellants, hereinafter known as the Board of Directors of the Fairview Public Utility District, Number One, are Board of Directors of a public corporation organized and existing under the laws of the State of Alaska.

The question involves the method of dissolution of

said Public Utility District and quotes certain Sections of the Alaska Compiled Laws Annotated, 1957 Supplement, namely, Section 49-2-13 and Section 16-1-5 as being unworkable because a plurality vote of 3 5's is required, the area in question has already been annexed and therefore doesn't exist, the portion pertaining to U.S. Commissioner's no longer applies since U.S. Commissioners no longer exist and there is no workable statute providing for dissolution.

The Complaint charges the Board of Directors of the Fairview Public Utility District have failed to dissolve the District, and the City of Anchorage, having been charged by law to furnish municipal services to the annexed area, is doing so. By virtue of supplying these services, the City of Anchorage asks for dissolution as a matter of law and that the City of Anchorage be declared the legal successor to all the previous rights and interests of the annexed area, including the disbursement of funds already collected by the Fairview Public Utility District. The City further asks for a date when all the affairs of the annexed area shall be completed and its assets transferred to the City.

The Appellants in their Answer and Counterclaim give the usual reasons for defense—"complaint fails to state a claim upon which relief can be granted." The Appellants also state the Court lacks jurisdiction in the dissolution of a public utility district and avers that such dissolution can only occur by a vote of the affected property owners. The Appellants question the validity of the purported annexation, stating it is without authority of law and that neither the Local Boundary Commission, nor the City of Anchorage had any right, either under the Constitution or the laws of the State of Alaska to do any of the purported acts and things stated by the City of Anchorage in their Complaint. They further declare that the City of Anchorage has usurped the proper governmental powers of the Public Utility District which is without warrant authority or sanction of law. The Board of Directors are unable to dissolve the Public Utility Dis-

trict as they have no authority to conduct such dissolution except under the laws pertaining to such dissolution, and in turn, questions the authority of the City of Anchorage to institute such proceedings.

In the Counter-Claim against the City of Anchorage, the Mayor, the City Councilmen, the City Clerk, the City Manager, the Fire Chief, Chief of Police, the Local Boundary Commission of the State of Alaska, and the Director of the Local Affairs office of the Governor of the State of Alaska are named as additional defendants. The Counter-Claim further states that on or before March 20, 1960, the Local Boundary Commission, together with the Director of Local Affairs, purported to exercise certain powers which resulted in a declaration of annexation of the said Public Utility District, and by exercising these powers the Local Boundary Commission and the Director of Local Affairs did not comply with any of the substantial or procedural requirements of law set forth in Title 16, Article 2, Alaska Compiled Laws Annotated, Cumulative Supplement, in that no petition for annexation was filed, no publication was made, no opportunity was given for citizens to object, no hearing was held, no election whatsoever was held, no votes cast, counted, canvassed, or declared—all of which does not comply with the applicable statutes of the State of Alaska.

Further, this usurption of governmental functions vested in the Fairview Public Utility District, No. 1, the interference by the City of Anchorage within the area known as the Fairview Public Utility District, No. 1, has caused irreparable damage of the Public Utility District, its officers, electors and property owners. A breakdown of local government, resulting in general confusion is alleged, there being no adequate remedy at law.

The Court is asked to add the parties named above, to restrain the City of Anchorage pending the litigation, to declare the annexation void, and requests costs and reasonable attorney's fees.

Statement of Fact

In February, 1960 the Local Boundary Commission, an appointed agency by the Governor of the State of Alaska, adopted a formal recommendation under the guise of a "proposed boundary change" which in effect annexed the entire area of the Fairview Public Utility District, Number One, a public corporation to the City of Anchorage, a municipal Corporation. After giving their report to the legislature, a resolution by the Committee of Local Affairs of the House of Representatives was introduced disapproving of this "boundary change." The House of Representatives passed by more than a 2/3's majority the resolution of disapproval. However, the Senate of the State of Alaska did not. Thereupon, the City of Anchorage, by City Council action, accepted the "boundary change" as valid annexation and on March 22, 1960 passed ordinance number 1389, officially confirming and accepting said annexation. Immediately thereafter the City of Anchorage exercised administrative jurisdiction and governmental authority within the Fairview Public Utility District Number One area.

This litigation is the result of the failure to resolve the claims and interests of these two conflicting municipal organizations.

Issues Presented

The issues presented by this litigation are as follows:

1. Was the purported annexation of the Fairview Public Utility District, Number One, to the City of Anchorage legal and in accordance with law?

2. Did the Court have the authority to appoint a receiver for the Fairview Public Utility District?

3. Did the City have the authority to commence municipal proceedings without an election showing consent by the people of the area affected?

4. Did the City of Anchorage have the authority to encumber the real and personal property of the peo-

ple in the Fairview Public Utility District, without their consent?

5. Are the statutes pertaining to the dissolution of any Public Utility District valid and in force?

Argument

Annexation of any area by compulsion, without a vote of the people concerned, is a matter of grave concern to any citizen. The sponsors of this litigation, the Alaskan Right to Vote League, Inc. feels every citizen bears a responsibility for advancing his own rights and that the violation of any citizens' rights is a violation of their own.

This case clearly represents the violation of every citizen's rights and particularly those guaranteed under the Constitution of the United States—the right to vote. To deliberately usurp the rights of others without due process of law is not only un-constitutional but an assault on the basic concepts of every American who believes he has the same rights under the Constitution of the United States as his next door neighbor, regardless of race, creed or color.

A case in the United States Supreme Court regarding a similar instance wherein the City of Tuskegee, Alabama by changing its boundaries, excluded certain portions because of the color of the inhabitants therein is almost an identical parallelism to the instant case. See *Gomillion* vs. *Lightfoot* Opinion No. 32, October term, 1960. In this case, the citizens were excluded and denied their right to vote. However, in a concurring opinion, Mr. Justice Whittaker redefines the case as eliminating the issue of color and placing the redefining of boundaries by an Act 140 of the Legislature of the State of Alabama as a act to abridge the "right . . . to vote," in the Fifteenth Amendment sense.

Let us go back a little into Alaskan history and trace the events leading up to this purported boundary change.

Prior to Statehood, the Territory of Alaska was an

undeveloped, sparsely populated area with large areas nothing more than wilderness. An Act of Congress created cities. For instance, Juneau and Fairbanks. Prior to 1912, Alaska didn't even have its own Legislature. Even the City of Anchorage was incorporated under Federal statutes, when it was nothing more than a railroad center.

In 1923 the Alaskan legislature was granted authority by the Federal government to enact general laws for the incorporation and self-government of Alaskan cities, that being the only type of government centers existing at that time.

In the Organic Act of 1884, Congress had imposed special limitations upon the powers of the Territorial Legislature providing for a county form of government "until it shall be submitted to and approved by the affirmative action of Congress" *Organic Act (37 Stat. 512)* Sec. 9: Sec 4-3-1, ACLA 1949. Quite naturally no county form of government was formed.

Undoubtedly, this restriction plays considerable emphasis upon the development of Alaskan cities, as authority had been granted for their development only. The hang-over of restrictive legislative powers probably channeled grooves in the minds of those either elected or appointed to guide the destiny of this State, so that any attempt to form a type of government which required Congressional approval was frowned upon. Hence the rule of cities became supreme.

It is a question of self-preservation as far as Juneau, Fairbanks, or the City of Anchorage is concerned. Once the City of Anchorage acquired a power, it grudgingly gave it away, and seldom without a great fight. Instead, the reverse is true. The City of Anchorage maintains it is a separate entity, above the reach of law, and immune to attack from any source, and proves this attitude repeatedly in its dealings with any of its sister cities or suburban communities—the City of Anchorage can do no wrong.

With the advent of World War II, many changes occurred. Transportation facilities, both by air and

by roads eased considerably the problem of lack of communication. And, with the settling of many areas by returning servicemen who, having been stationed in Alaska, brought their families, after the War. Population increased. Naturally, the settled areas attracted the incoming population who wanted services similar to those in the States which they had left.

Unfortunately, the grooves were too deeply etched and the pioneers within the City of Anchorage, through the City Fathers, refused to extend services to those who settled outside their city limits, on the basis that the land inside should be used. But the prices of that land were so high, many were forced to settle outside the established community. Almost by magic new communities sprang up, known as Mountain View, Spenard and Eastchester (now Fairview). Demands for roads, water, electricity, sanitation, police and fire protection were made to the established communities. Again, the City Fathers said that these public services would be extended on their basis—the land within the City must be purchased and at their prices.

See: Hearings before the Subcommittee on Territorial and Insular Affairs, House of Representatives, 84th Congress, 1st Session, pursuant to H. Res. 30 (Part 2, Serial No. 27, 1955), pp. 134-135.

In order to provide facilities, these communities outside the City of Anchorage formed cooperatives and furnished power. Lacking sufficient economic status to incorporate, the communities requested limited grants of power from the Alaskan legislatures. In 1949, and then in 1951, 1953, 1955 and 1957, the Alaskan legislatures granted these requests, expanding the powers until a quasi-municipal corporation, called a Public Utility District was defined.

First created in 1939, the powers granted to the Alaskan Public Utility District became greater than similar corporate bodies in the then 48 States. Therefore comparison of the names without defining the powers of the names—i.e. public utility district, water

district, etc.—is without standing and cannot be cited. For instance, Alaskan Public Utility Districts had the power to exercise the right of eminent domain; to build dams, reservoirs, power houses and structures, transmission lines, water works, telephone systems, light plants, hospitals, docks, warehouses, cold storage plants and fish canneries; to issue bonds and incur indebtedness for the acquisition or installation of public plants; to construct public utilities; to levy taxes to pay bonds; to levy and collect taxes upon all real and personal property and to expend the same in payment of the cost of conducting elections and the construction operation and maintenance of public improvements; to refund bonds issued; and to enforce the assessment of taxes by lien and foreclosure of property.

To these powers, the legislature subsequently added the authority to construct, maintain and operate garbage disposal facilities, park and recreation facilities, traffic and warning signals, street lights, facilities for controlling and preventing fires; to create, operate and improve roads, trails, walks, bridges, and drainage ditches, or to contract therefor; to own and operate public utilities or to grant franchises with reference to such utilities; to make ordinances providing for the exercise of these powers; to provide, by resolution or ordinance, for the public health; to prescribe by ordinance and under such rules and regulations as it may prescribe, for the grant of easements and for the renewal thereof; for the construction, installation and maintenance of any and all utilities, including but not limited to water and sewage lines, on public property, streets, and roads located within and under the jurisdiction of the district; to provide for sewer systems; to create local improvement districts and assess costs against benefited properties in the same manner as incorporated cities; and to enforce tax liens against personal or real property in the same manner as granted by law to municipal corporations and their common councils.

See: Title 49, Chapter 2, ACLA 1949, as amended and supplemented.

In reality what had happened, was the creation by the State Legislature of a type of government paralleling the county type of government in the then 48 States.

Then came the awakening of the City of Anchorage. In 1952 a change came over the City Fathers of the City of Anchorage. Where before no attempts at expansion were made, now having seen wherein the City of Anchorage was completely surrounded by communities, who, having once having asked for assistance and receiving none, were self-sufficient and did not want the City of Anchorage, the City began annexation programs.

("The opposition (to annexation) in part is traceable to the failure of the city (of Anchorage) during the boom to extend its facilities into the areas as they developed. This delay resulted in the extension of privately owned utilities and the organization of public utility districts." Folta, J. in the case of *In re Annexation to City of Anchorage* (DC Alaska, 1955), 15 Alaska 504, 509, 129 Fed. Supp. 551.

Carefully engineering piecemeal annexation of areas which resisted gerrymandering tactics, the City of Anchorage annexed Mountain View and Eastchester Flats. Little has been done to improve either area since the annexation maneuver by the City of Anchorage, although citizens within each area have gallantly fought for improvements.

Seven times the Fairview area voted against annexation to the City of Anchorage.

Any attempt on the part of any suburban areas to incorporate or expand further into the area of zoning and police protection, was bitterly opposed by the City of Anchorage; in the courts and on the floor of the Legislature.

Like sitting ducks, each area was prevented from flying the blind the City of Anchorage had built until

another area was needed to support the growing indebtedness of the City of Anchorage and then the area was "annexed" to provide as its share of the hunt, the tax valuations of the property within the annexed area which would support the demands of the City Fathers to up the valuation of the property within the center of the City of Anchorage.

Because of the many controversies involving this procedure, the 1957 Legislature completely revised the laws pertaining to annexation of territory to incorporated cities, by repealing Section 16-1-21 through 16-1-28, ACLA 1949 as amended: enacting Title 16, Article 2, Sections 16-1-29 through 16-1-29 (n) of the Code.

The First Session of the First Legislature of the State of Alaska, convening January 26, 1959 and adjourning April 16, 1959, and acting under the Constitution of the State of Alaska, did not consider in any manner as repealed the new annexation laws indicated above, but did further amend them in Chapter 103 of the Session Laws of 1959, at page 107, effective April 21, 1959, by revising subsections (2) and (3) of Section 16-1-29 (h), thus giving express recognition to the continued efficacy of the modified annexation laws.

Likewise, the 1957 Legislature amended Section 49-2-13 ACLA 1949, pertaining to the dissolution of public utility districts, specifically the manner of dissolution by a vote of the electors and protecting the contractual duties of the dissolved district.

Let us traverse back to the time of the Constitutional Convention, who met prior to statehood, at College, Alaska, in 1956. On the floor of that convention, the controversy of city and public utility district, counties and local government was bitterly contested. And a compromise was effected. An experiment in the type of government outside cities was promulgated.

Beginning with Article X of the Alaska Constitution, Section 2, the Convention provided that: "All local government powers shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only."

In orderly fashion, the sections that follow provide for the creation of organized and unorganized boroughs, for the incorporation and government of cities and for the interrelationships which were to exist between these two forms of local self-government. In Section 12, Article X, provision was made with respect to the boundaries between these forms of government as stated:

> "Section 12. A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the Legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action."

And following Section 12, in Section 15, the disposition of existing non-city types of government was provided:

> "Special service districts existing at the time a borough is organized shall be integrated with the government of the borough as provided by law."

It is evident that an orderly, step by step regulated procedure, from Section 1 through Section 15, in just that order, was contemplated under Article X.

The only governments existing would be cities and boroughs. The Legislature would determine boroughs, their powers, their functions and how they were to be organized. The existing special service districts are to be integrated within the borough in a manner provided by the Legislature.

And, then, and only then, after all these changes had been effected, then changes in the boundary of "local governments" would be under the jurisdiction of the Local Boundary Commission as specified in Section 12, Article X of the Alaska State Constitution.

The references to "special service districts" in Section 15, Article X applies to public utility districts, school districts and health districts, there being no other "special service districts" in Alaska.

But this would all occur *after* (emphasis supplied) the legislature had passed the necessary legislation incorporating these areas into the boroughs.

Statehood, in becoming effective January 3, 1959, implemented the new Constitution and in Section 1 of Article XV of the Alaska Constitution we find this statement:

> "All laws in force in the Territory of Alaska on the effective date of this Constitution and consistent therewith shall continue in force until they expire by their own limitation, are amended or repealed."

The transitory provisions are also contained in the Alaska Statehood Act, Public Law 85-508, 85th Congress, July 7, 1958 (72 Stat. 339) which provides in Section 8(d) that:

> "Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska, shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, as thereafter modified or changed by the Legislature of the state. . . .

There has been no attempt by the State Legislature to repeal any of the laws pertaining either to annexation of territory to cities or to the dissolution of public

utility districts, but instead, by making a minor amendment, as indicated previously, has indicated its intent to keep these laws intact.

To presume that other than an orderly, transitional flow of governmental powers from Territory to State and from State to local government is possible is to abort the efforts of those who in constructing the Constitution of the State of Alaska provided procedures to safeguard the rights of the citizens therein.

Clearly, the Local Boundary Commission overstepped its authority. How could this happen? Let us review the affidavit of Gara Lyon, a member of the Local Boundary Commission in Cause No. 60-250, appealed to the Supreme Court of the State of Alaska. In detail, this Affidavit relates the unawareness of annexation procedures and the reliance upon George Shannon, then City Manager of the City of Anchorage, who was "more familiar with annexation procedures" to prepare a formula for adaptation by the Local Boundary Commission. Here we have the basis for the later recommendation by the Local Boundary Commission to annex a public corporation to a municipal corporation, authored by the City Manager of the municipal corporation who had seven times attempted to acquire the area by a vote of the people and had been rebuffed each time. Here was a golden opportunity to get around that frustrating block that had always succeeded in maintaining the status quo—the right to vote. By eliminating the voting of the people in the area concerned, any municipality could gobble up any other area by gerrymandering, annexing by recommendation of the Local Boundary Commisison or if the necessity demanded—allowing a vote.

To affirm this line of reasoning, let us compare the testimony of one Tom Moore, representing himself as an interested taxpayer at the Local Boundary Commission's Hearings at Anchorage the week-end of December 19-20, 1959. Again, the same men who filed the prepared affidavits by the City of Anchorage in this

instant case attended and discussed the annexation of Fairview to the City of Anchorage, and the procedures previously utilitized:

> Chairman: "Before we get into that, Mr. Moore, may I ask one question. The Fairview area you are speaking of, so the Commission will have a little background on it, have you ever voted for annexation? Has there ever been a vote taken on it or anything?
>
> Moore: Yes, actually we tried to annex the entire area and I say we, because I was instrumental in circulating some petitions and we were defeated as a whole. Then as a last recourse, for some of the people who owned property who desired better improvements and services which were available to them if we were in the city of Anchorage, reverted to piece-meal annexation. And I might say that in that case we, out of several districts, which were piecemeal annexed, by then we lost one, only by two votes. . . ."

And so, by the preparation of annexation procedures for the Local Boundary Commission who were not versed in same, by the City Manager of the City of Anchorage, the long long story of the compulsive annexation of the Fairview Public Utility District Number One was begun.

It is inconceivable that the Alaskan legislature deliberately violated the United States Constitution in accepting the recommendation of the Local Boundary Commission concerning the annexation, without a vote of the people affected. We prefer to think that the fact that no definite conclusions by the interpretive branch of our government, the U.S. Supreme Court, as to annexation procedures involving the lack of voting, precluded their arguments on the floor of the Legislature. Certainly the fact that a solid vote by both Houses of the State Legislature did not occur is reason to doubt the statements by the City of Anchorage in

their memorandums that the State Legislature by failure to deny the recommendation of the Local Boundary Commission, concurred in their decision. This is a rather insignificant manner of passing a law. It has usually been the custom for both houses to pass a bill, making it a law, subject to the governor's veto. Here we have one part of the State Legislature agreeing, and one part disagreeing, with no submission to the Governor. By no stretch of the imagination can one impose the dignity of "law" as readily understood by the average citizen wherein a bill is introduced in either House, debated, passed, sent to the other House, and eventually signed into law by the Governor, on this ignominious attempt to bypass the will of the people.

We challenge the ipso facto annexation of the Fairview Public Utility District Number One to the City of Anchorage as unconstitutional. We base our case, apart from the non-conformance to the State Constitution and to the existing laws of the State of Alaska, on the grounds that the citizens of the Fairview area are being denied their rights as guaranteed under the U.S. Constitution.

In *Hunter v. Pittsburgh*, 207 U.S. 161, citizens of Allegheny, Pennsylvania claims that the General Assembly of that State could not direct a consolidation of their city and Pittsburgh over the objection of a majority of the Allegheny voters. It was alleged that while Allegheny already had made numerous civic improvements, Pittsburgh was only then planning to undertake such improvements, and that the annexation would therefore greatly increase the tax burden on Allegheny residents. The case held that (1) there is no implied contract between a city and its residents that their taxes will be spent solely for the benefit of that city, and (2) that a citizen of one municipality is not deprived of property without due process of law by being subjected to increased tax burdens as a result of the consolidation of his city with another.

The *Hunter* opinion intimates that a state legislature may not be omnipotent even as to the disposition of some

types of property owned by municipal corporations, 207 U.S., at 178-181.

The Boundary Commission's purported authority is quite clearly challenged in *Nixon v. Herndon, 273 U.S. 536, 540*, which says, "Of course the petition concerns political action," but "the objection that the subject matter of the suit is political is little more than a play upon words." A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries.

In the matter of *Gomillion* v. *Lightfoot*, Opinion No. 32, October term, 1960, U.S. Supreme Court, the Justice delivering the opinion states that the Act 140 which the Alabama legislature passed did not "merely redraw the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries."

"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

We submit the Rule of State Decisis must apply in the case of Wood vs. Gray (No. 41, Supreme Court of the State of Alaska) in that where a point of law has once been settled by decision, it forms a precedent which is not afterward to be departed from, or lightly overruled or set aside even though it may seem outdated. *14 Am. Jur. 283, et seq.*

And while the Parks case, No. 60-120, being a persuasive and not imperative case, has been relied upon by the lower Court, the decision in the Woods case supersedes.

Conclusion

We therefore pray this Court to reverse the judgment of the Superior Court, Third Judicial District and direct the entry of an order to reverse the purported annexation of the Fairview Public Utility District Number One, to set aside all attempts on the part of the City of Anchorage to inflict their desires upon the citizens within the Fairview area, in the way of governmental procedures, to return all the assets seized by the City of Anchorage to the Board of Directors of the Fairview Public Utility District Number One and all taxes collected in this interim period to be itemized and returned to the Board of Directors of the Fairview Public Utility District, and all records pertaining and belonging to the District be returned, and for whatever relief and equity the Court deems proper, including attorneys' fees and costs.

Respectfully submitted,

Pauline Truex,
Pro persona

Dated: April 27, 1961

APPENDIX VI

IN THE SUPREME COURT OF THE STATE OF ALASKA

No. 71

LAWRENCE HAWK, et al,
Appellants

vs.

FAIRVIEW PUBLIC UTILITY, DISTRICT NUMBER ONE, et al,
Appellees

CITY OF ANCHORAGE, a municipal corporation,
Appellees

On Appeal from the Superior Court of the State of Alaska Third Judicial District

BRIEF FOR APPELLANT

Jurisdiction

This case is before the Court on appeal from a final judgment of the Superior Court, Third Judicial District, dated July 29, 1960. See Rule 6, Rules of the Supreme Court of Alaska. Said final judgment dismissed appellant's complaint. Notice of appeal was timely filed on September 9, 1960 in accordance with Rule 7 of this Court's Rules.

Statement of the Case

Appellants, residents, taxpayers, property owners, business licensees and qualified electors, respectively, in the municipal corporation of the Fairview Public Utility District Number One in the State of Alaska, filed a Complaint for a Mandatory Injunction and other relief against the officers and directors of the said Utility District, requesting them to continue functioning as officers and directors and to require them to set up

and hold an election of new directors and officers of the Utility District. The basis for the Complaint lies in the refusal of said officers and directors to comply with law, particularly Title 49, Chapter 2, ACLA 1949, as amended and supplemented, as well as Section 29-2-9 and Section 29-2-10 ACLA 1949.

A Hearing on a Motion for Order to Show Cause on June 14, 1960 resulted in the Court agreeing with the facts, but delaying any decision until the Court could consider two other cases concerning the Fairview annexation. These cases No. 69 and 70 of the Supreme Court File, are presently on Appeal. Case No. 70 questions the authority of the Local Boundary Commission. Case No. 69, concerns the legality of annexation procedures wherein the right to vote is denied. These are separate cases and shall be considered same by the Sponsors, inasmuch as three separate points are to be decided any one of which does not necessarily involve the other two cases, although somewhat related.

The City of Anchorage, Appellees, filed a Motion to Intervene on the grounds that Cases No. 69 and 70 have common questions of law and fact with this action and should be decided before the relief sought by the Appellants could be granted. The Appellants opposed the Intervention on the grounds that the City of Anchorage has no lawful interest in the litigation, inasmuch as the property owners of the Fairview Public Utility District were requesting an election be held in accordance with law and that intervention by the City was a matter of interference. A lengthy memorandum concerning the right to intervene brings out a point worth mentioning, that laws in force prior to the Constitution of the State of Alaska remain in force during the transition period, unless repealed by the Legislature.

The reason for this complaint is further explained by an Answer filed by two of the Fairview Public Utility District Board Members who state that the other three defendant board members, William E. Moore,

Glenn H. Eagon, and Al Otter have failed to attend board meetings, and that one member is not legally a member of the Board due to his having failed to comply with the By-Laws of the Fairview Public Utility District Board as to residency requirements. From the Answer it is apparent that an attempt to cooperate with the City of Anchorage by a "prompt and speedy determination by the Superior Court of all outstanding legal issues created by the purported annexation of the PUD area to the City of Anchorage, including, inter alia, questions relating to the future conduct and business and affairs of the defendant PUD."

It is also apparent from the letters to the Presiding Judge in the case from the various counsels that the line of communication had failed and a delay in obtaining a decision was working adversely to the affairs of the Fairview Public Utility District, No. 1.

The decision rendered by the Superior Court on the 29th day of July, 1960 ignored the issues raised by the original complaint and interposed another statement which had not been brought into this particular case by declaring, in his decision concerning Case No. 60-267 in which he embraced all the cases: "the entire area within the boundaries of the Fairview Public Utility District Number One has been validly annexed to the City of Anchorage and the utility district as a matter of law was dissolved, except insofar as it might be necessary to wind up the affairs of the utility district." The Court further stated that there was nothing for the Court to decide in the proceeding and dismissed the case without costs to any of the parties, entering an order of dismissal.

Issues Presented

The issues presented by this litigation are as follows:

1. Do the laws pertaining to the dissolution of a quasi-municipal corporation, namely the Fairview Public Utility District Number One, remain in full force

and effect even though a different method of annexation was utilized?

2. Does the Superior Court of the State of Alaska have jurisdiction and legal authority to decree the dissolution of the Fairview Public Utility District, without an election held in compliance with existing statutes?

Specification of Errors

The lower Court erred as follows:

1. By erroneously dismissing the case without deciding the merits presented to the Court.

2. By failing to rule on the merits of the complaint.

3. In failing to rule on the manner in which the laws should be interpreted which was the original complaint, the Court ignored the need for an election of Directors, to carry out the affairs of the District, whether the annexation was valid or not valid.

4. The Court, in adding the question of validity of annexation, misconstrued the complaint and ignored the very real and necessary need for officers to complete the affairs pending before the Fairview Public Utility District Board, including the collection of taxes due at that time.

5. By assuming that dissolution takes place as a matter of law, without a vote of the people concerned, there has resulted a situation which the counsel for the Appellants predicted would happen—The Fairview Public Utility District has been destroyed as a functioning entity, simply by delay and inaction in the Courts.

6. In considering the cases cited by counsel for the City of Anchorage while persuasive and interesting, are not binding or imperative upon the Court.

7. Court erroneously construed the decision rendered in Case No. 60-120, entitled Park et al, plaintiffs vs. City of Anchorage, defendant, as imperative in rendering the opinion by the Court on July 18, 1960 in this instant case.

8. By failing to grant the Mandatory Injunction

to demand an election of the Fairview Public Utility District No. One against the preponderance of the evidence and contrary to applicable law.

Argument

The Court below decided this case upon the merits of the Parks case, No. 60-120, without determining the value of the enforcement of the laws already in force.

Appellants do not wish to make an issue of the various prejudicial areas involved in this case, preferring to remain at all times objective in their unique position, of being forced to defend their Constitutional rights—THE RIGHT TO VOTE.

While the pleadings, motions, memorandums, points and authorities filed by both counsels are worthy of attention, time has eliminated much of the need for considering these passe' documents.

In view of the recent decision by the Supreme Court of the State of Alaska, in the matter entitled, "Dissolution of the Mountain View Public Utility District No. 1 (Sidney J. Wood, Appellant, v. C. C. Gray, Appellee.) Opinion No. 41, dated February 24, 1961, the question of the authority of the judiciary in the dissolution of a public utility district has been settled. On Page 9 of this opinion, the Supreme Court indicates quite amply the procedure to be followed in the dissolution of a Public Utility District.

The Opinion clearly states that the judiciary has no authority to intervene in a matter which the legislature has already conferred upon a quasi-municipal corporation.

Appellants have read thoroughly the Opinion in the matter of appointment of a Receiver for the Mt. View Public Utility District by the Court and the reference to lack of legislative consent to judicial interference in statutes dealing with public utility districts. It is their opinion that the precedent has already been well established by the Supreme Court of Alaska.

However, in order to guarantee that a precedent con-

cerning future attempted annexations within this State shall be spelled out in clear-cut, readily understood language, the Appellants respectfully request the Supreme Court to make a decision on the points of law raised in this case.

To aid in the establishment of a precedent, Appellants wish to refer to Opinion No. 32 of the United States Supreme Court, dated November 14, 1960 concerning the City of Tuskegee, Alabama.

In this case, the opening statement by Mr. Justice Frankfurter is almost parallel with the conditions of the Fairview Public Utility District. By inserting the words pertaining to this case, such as Alaska, Fairview and City of Anchorage, one could readily perceive the exact parallelism between the two cases. That the citizens of Tuskegee who filed the complaint happen to be Negro is only incidental to the case. We do not wish to enter into the cause of segregation by citing the fact that the reverse of this situation happened in Alaska—to wit: white and Negro citizens of the Fairview Public Utility District were annexed to another area, WITHOUT THE RIGHT TO VOTE.

In this case several points were clarified which pertain directly to all annexation cases, as well as the Fairview annexation case.

We cite this case particularly because so many side issues are settled therein.

In the case HUNTER V. PITTSBURGH, 207 U.S. 161, it was determined that "a citizen of one municipality is not deprived of property without due process of law by being subjected to increased tax burdens as a result of the consolidation of his city with another." This specifically pertains to the instant case wherein the Court held that "having decided No. 60-267 no case exists in Case No. 60-505." Appellants aver that the matter of "due process of law" enters quite strongly into this case and dismissal without consideration of the points raised is violation of the 14th Amendment of the Constitution of the United States.

One phrase which applies most definitely to this case

is the discussion on applying out of context in disregard of variant controlling facts. Justice Frankfurter has this to say:

> "Particularly in dealing with claims under broad improvisions of the Constitution, which derive content, by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts Thus, a correct reading of the seemingly unconfined dicta of HUNTER and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases."

While this particular phase of Legislative power is not specifically mentioned in this Action, we feel that inasmuch as Case No. 60-267 will not be heard until after this case, due to the length of its preparation, the Appellants wish to lay the groundwork for a greater authority, namely the U.S. Constitution, which restricts the power of any State Legislature to do as they will with those express rights, specifically outlined in the document . . . including the right to vote.

We quote, again from Opinion No. 32 of the U. S. Supreme Court:

> "This line of authority conclusively shows that the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. The observation in GRAHAM v. Folsom, 200 U. S. 248, 253 becomes relevant: "The power of the

> State to alter or destroy its corporations is not greater than the power of the State to repeal its legislation."

To allay the fears of counsel for the Appellees that we, the Appellants may be attempting to drag in a Civil Rights issue, we wish to refer to the last page of the Opinion, wherein Mr. Justice Whittaker, in concurring stated:

> "I am doubtful that the averments of the complaint, taken for present purposes to be true, show a purpose by Act 140 to abridge Petitioner's "right .....to vote." in the Fifteenth Amendment sense. It seems to me that the "right.....to vote" that is guaranteed by the Fifteenth Amendment is but the same right to vote as is enjoyed by all others within the same election precinct, ward or other political division."

This line of reasoning removes the question of racial right to vote and places it on the broad plane where any American, no matter what race, color or creed is guaranteed the right to vote.

We hold dear our beliefs in the United States of America. It may seem incredible to those who may feel that by enjoying the phrase "professional" that laymen, of average education, should attempt to pick up the very difficult and complicated cases involving so many phases of Alaskan law and proceed with the case, without counsel.

There is a certain humbleness in our desire to carry this case through to completion. Our cause is so basic, so just, so earnest that we feel supremely confident that once the issues were presented, we would receive immediate assistance.

It is with deep appreciation we acknowledge the wonderful sustaining assistance from members of the legal profession all over the United States who, having heard of our plight, have offered their services, either

as our counsel or as amicus curiae. Their encouragement, correspondence and offer of briefs of similar cases have been of the greatest assistance.

This is no ordinary case. It is not small in content. We feel the whole future of the State of Alaska rests on the decisions made in these cases, for, if the rights of the individual citizens are ignored, then the vote of no confidence for the legislature and the officials purporting to be our leaders shall be given and the Exodus from this pioneer state shall begin.

Flaunting the established procedures set forth by the law under which this Country was founded is sufficient to create a sense of imbalance.

We are citizens first of the United States, then of the State, and then of the City or County or other area within that State. Whether it was correct or not for the City of Anchorage to annex another area which has successfully combatted the attempts seven times before is incidental before the overwhelming factor that being denied the right to vote is the most base of crimes against the U.S. Constitution under which we live.

Conclusion

We, the Alaskan Right to Vote League, Inc. respectfully request the Supreme Court of the State of Alaska to forthwith declare the necessity of an election in the Fairview Public Utility District Number One for the selection of proper directors who will continue the functions of this Public Utility District according to law.

Respectfully submitted,

Leonard J. Grau.
Pro Persona
Alaskan Right to Vote League, Inc.

Dated: April 15, 1961

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 223

FAIRVIEW PUBLIC UTILITY DISTRICT, NUMBER ONE, WILLIAM E. MOORE, FERN WILLIAMS, GLENN H. EAGON, AL OTTER, PAULINE TRUEX, *Appellants*,

vs.

CITY OF ANCHORAGE, A MUNICIPAL CORPORATION, *Appellee*

LAWRENCE HAWK, ET AL., *Appellants*,

vs.

FAIRVIEW PUBLIC UTILITY DISTRICT, NUMBER ONE, ET AL, AND THE CITY OF ANCHORAGE, A MUNICIPAL CORPORATION, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 223

FAIRVIEW PUBLIC UTILITY DISTRICT, NUMBER ONE, WILLIAM E. MOORE, FERN WILLIAMS, GLENN H. EAGON, AL OTTER, PAULINE TRUEX, *Appellants*,

vs.

CITY OF ANCHORAGE, A MUNICIPAL CORPORATION, *Appellee*

LAWRENCE HAWK, ET AL, *Appellants*,

vs.

FAIRVIEW PUBLIC UTILITY DISTRICT, NUMBER ONE, ET AL, AND THE CITY OF ANCHORAGE, A MUNICIPAL CORPORATION, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

Appellants, pursuant to Rule 16, Section 3 of the Revised Rules of this Court, hereby present their brief in opposition to the Motion to Dismiss or Affirm heretofore filed by Appellee for the following basic reasons:

A. The Motion is not filed in conformance with Rule 16, Paragraph 1 of the Revised Rules of the Supreme Court.

Proof of service shows June 25, 1962 as the date the jurisdictional statement in its typewritten form as required by the Rules of this Court was served on Appellee's Counsel. More than thirty days elapsed before the service of the undated Motion which on its face was mailed on August 8, 1962.

B. The questions presented by the Motion and Answers thereto present no foundation for Dismissal or Affirmance.

C. A map or diagram is attached to said Motion which is highly improper in view of the fact that it would amount to evidence and was at no time presented in the lower Courts. Said map is grossly inaccurate as will be shown later.

Questions Presented by Appellee

1. Whether federal questions which are not raised in the pleadings in the trial court but are mentioned in unspecific broad terms in briefs in the Supreme Court of Alaska can be a basis for review jurisdiction in this Court?

2. Whether, in light of the fact that the Appellants failed to raise any federal questions in the trial court and the arguments raised in the State Supreme Court concerning the right to vote and due process were not ruled upon by the State Supreme Court, the Appellants can now, for the first time, come forward with questions of equal protection and privileges and immunities?

3. Whether annexation of territory to the City of Anchorage by state legislative act deprives residents of the annexed territory of a federally guaranteed right to vote on that annexation?

Generally speaking, the questions as presented by Appellee do not cover the fine points of the case before us. It is not clear whether Appellee is claiming that a constitutional question must be raised in original pleadings in trial courts for this Court to review. Just what is meant

by "unspecific broad terms", is likewise uncertain, as will be discussed later in the Argument. Regarding the second question, raised by Appellee, there is a misstatement of fact, since the Argument raised in the State Supreme Court concerning the right to vote and due process were in fact ruled upon by the Alaska State Supreme Court as pointed out in the jurisdictional statement of Appellants and discussed more in detail in the Argument which follows. As far as equal protection and privileges and immunities are concerned, once the Fourteenth Amendment is raised, all of its provisions are before the Court. The third question states only a part of the true issues here involved inasmuch as we are not faced with a bare question of annexation by a State legislative Act without the right of the residents of that area to vote, but with a given right to vote for just such annexation which was denied some residents and given to some residents.

Statement of the Case

Fundamentally Appellee properly stated the case with certain glaring exceptions as set out below.

The second paragraph of the Statement of the Case, appearing on Page Two of the Motion to Dismiss, admits the inequalities of the law. It should have stated however, that neither the Acts set a standard as to when one method will be used and when the other will be used.

Paragraph 3, Page 3 of the Motion to Dismiss is in error as the map above referred to and improperly included by Appellee is erroneous. Only one section is the Fairview Public Utility District Number One, another section therein called Fairview is Government Hill, and the Third section is Turnagain. Neither of these had a Public Utility District within it.

This erroneous, self-serving, unrealistic drawing omits also to include the Spenard Public Utility District, by pur-

portedly calling it Anchorage. This was the area which was permitted to remain independent by the petition-election method.

The most glaring error in the Statement of the Case is that no Federal questions were raised, since no more serious Federal question can be raised than the right to vote and the right to equal protection of the law and the right to due process of the law. These questions were all raised by the Appellants and were passed upon by the Alaska Supreme Court, as shown by the jurisdictional statement at Pages 25, 26 and 27. These matters were discussed in the Supreme Court Opinion in the Appendix of the jurisdictional statement, at Pages 38, 39 and 40.

It is to be noted that no evidence was heard at any time in this case, so Appellee's use of "facts presented" is generally erroneous.

Argument

The statute creating the Boundary Commission and its Constitutionality is discussed at length throughout the Supreme Court Opinion appearing in the Appendix to the Jurisdictional Statement. Particularly does the Court say at Page 39 that the two methods of annexation, one by petition election and the other by the Boundary Commission were justified.

The contention of Appellee that the federal question was not timely raised cannot be seriously asserted in view of the Fourteenth and Fifteenth Amendments admittedly raised by the Court's discussion of these in its decision and the general admission of the matters raised by these Amendments throughout the briefs of the parties on both sides of the controversy. It is interesting to note that the cases cited by the Appellee have no similarity whatsoever to the case before us. It is elementary law that

the equal protection of the laws would include the right to vote, that due process of law would include a preservation of freedom, which has inherent therein the right to vote and that the equal protection of the laws "includes the protection of equal laws."

Appellee would rely on *White River Lumber Co. v. Arkansas Ex Rel.* 279 US 692, 699, 700. That case stands for the proposition that a constitutional question which does not appear by the record to have been presented to, or have been passed upon by a State Supreme Court but which is raised for the first time by the assignment of errors in this Court, cannot be considered here. It is submitted that not many pages of the Opinion in this case will be lacking in reference to either the particular Statute involved or to Constitutional Amendments under which the Appeal was sought in the Alaska Supreme Court. The Brief of the Appellee at Page 9, in the Alaska Supreme Court contains the following, ". . . relates only to alleged violations of the Fourteenth and Fifteenth Amendments to the Constitution of the United States . . .". This belies contention of Appellee's counsel that these questions are being raised for the first time in the United States Supreme Court. His contention of no federal question being raised in the Superior Court is not borne out by any cases requiring same. Even if same had been required and it is submitted that there is no such requirement, the fact that the Alaska State Supreme Court did consider and pass on same would place same properly before this Court for review on Appeal.

Although Rule 23 pertains to Certiorari, the principle is generally the same pertaining to Appeal and that provision states: ". . . the statement of a question presented will be deemed to include every subsidiary fairly comprised therein . . .". The Fourteenth Amendment

was before the Court. This meant privileges and immunities clause as well as all of its other provisions.

The next case mentioned by the Appellees is *CIO* v. *McAdorg*, 325 US 472, 477. In that case, at Page 477, we find the following language: ". . . that Court did not pass on that question either in its Opinion in this case or in its Opinion in the Alabama State Federation of Labor case which it adopted as controlling . . . since the State Court did not pass on the question now urged and since it does not appear to have been properly presented to the Court for decision, we are without jurisdiction to consider it in its first instance here . . ."

There is no similarity whatsoever to the situation in our case, since the Alaska Supreme Court definitely considered and passed on all matters now urged.

Edelman v. *California*, 344 US 357 is next urged as substantiating the position of Appellee. That case bears no similarity to the case at bar. The Constitutional question had been presented for the first time on Appeal to the California Superior Court, but had not been passed on since the Appeal was dismissed because of certain peculiarities of California procedure. However, the vigorous dissent of Justice Black with whom Justice Douglas concurred held that the question still should have been passed on.

In the dissenting Opinion of Chief Justice Earl Warren in *Communist Party of the United States of America, Petitioner* v. *Subversive Activities Control Board*, 367 US 1, we find the following at Page 119. ". . . In fact the U.S. Reports are replete with instances wherein the Court decided issues which were never even mentioned in the petition for certiorari. See *E. G. Boynton* v. *Virginia*, 364 US 454: *Mackey* v. *Mendoza-Martinez*, 362 US 384: *Neese* v. *Southern R. Co.*, 350 US 77: *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 US 129: *Marshall* v. *Pletz*: 317 US 383:

Erie R. Co. v. *Tompkins*, 304 US 64, and at Page 120 we find the following: " . . . And in *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, *supra*, the Court avoided a difficult constitutional adjudication by resting its decision on a non-constitutional ground which, as the Court noted, "was neither considered nor decided by the Court below, nor argued here." Id. at 132. Only last Term, in *Mackey* v. *Mendoza-Martinez*, *supra*, the Court, in an effort to avoid an unnecessary constitutional decision, remanded the case to the District Court for consideration by that Court of a non-constitutional issue which had not been raised by either party in any Court, but which this Court, *sua sponte*, had discovered lurking in the record . . ."

These are all of the cases cited by Appellee which deal with the presentation of the federal question. The others, such as *Hunter* v. *City of Pittsburgh*, 207 US 161, *Kelly* v. *City of Pittsburgh*, 104 US 78 and *Mt. Pleasant* v. *Beckwith*, 100 US 514, deal generally with annexation under circumstances and statutes having no similarity to the ones before us. It is generally submitted that here we have an unprecedented situation allowing arbitrary annexation by which you take your choice in getting the area. If, by petition and election, they do not choose to come in, then the Boundary Commission acts to force them in. The residents of the area are more like puppets. If they exercise their free choice and the City is not pleased, then the Boundary Commission exercises its choice. If the residents of a particular area are extremely powerful, as obviously the Spenard area residents were, then they may be allowed to remain free. If they are not powerful, as obviously the residents of Fairview were not, they become enslaved to the City. What certainly does a resident have? How long will he be a resident of a particular area? To what extent can he make plans for the future? What method will be

used to annex him if he is to be annexed? Will he have a chance to vote or will he not? These are vital questions touching the very heart of American life and freedom, similar to those of taxation without representation antedating the Revolutionary War.

On whether or not the questions presented are substantial we ask ourselves the question:

1. Who is to judge which of the two methods will be used?

This Court has consistently held that the equal protection of the laws means the protection of equal laws. Appellee seems to think a State can do anything and that a Municipal Corporation can do anything. This would completely ignore about twenty years of this Court's decisions which have dealt with segregation. An inequality is an inequality whether or not it pertains to race.

However, the contention that this is a State political question would place politics above Constitutional rights. The contention of all persons "similarly situated having been treated equally" has no basis since dual systems of annexation are admitted without discretion who knows where as to which will be used at a given time. Serious violation of Constitutional rights have occurred and in view of the fact that Alaska is a new State where this type of evil should be corrected early to avoid future confusion, the Question becomes extremely substantial.

Conclusion

We have no "redistricting" here as contended by Appellee but an annexation of a quasi-municipal Corporation by a municipal Corporation. Two separate laws for arbitrary application to citizens of a State as admitted by Appellee were available. The citizens were powerless to decide or to know which law would be available to them. The

law which takes away the right to vote is unconstitutional and a general procedure based on a dual system is unconstitutional. Vital constitutional rights are involved and this Court should decide this constitutional question which was timely presented. Alaska, being a new State, the largest of our 50 States with the potential for having the largest number of cities and the largest public utility districts in the nation, presents a more vital problem in this respect than any other State possibly could.

Dated at Anchorage, Alaska this 23rd day of August, 1962.

Respectfully submitted,

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